IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1870

AMERICAN BAKERS ASSOCIATION, *Petitioner,*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JACOB P. BILLIG
JOHN R. ATTANASIO
2033 K Street, N.W.
Washington, D.C. 20006
(202) 223-8270

Counsel for American Bakers Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

AMERICAN BAKERS ASSOCIATION, *Petitioner,*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, American Bakers Association, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in *The Atchison, Topeka and Santa Fe Railway Company et al.* v. *The United States of America, and The Interstate Commerce Commission,* No. 76-1198.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F.2d 1186 (Appendix A, *infra,* pp. a-1 *et seq.*); the order of the Court of Appeals denying petitions of petitioners and intervenor-petitioner for rehearing (Appendix B, *infra,* p. b-1) was not reported. The decision of the Interstate Commerce Commission (Appendix C, *infra,* pp. c-1 *et seq.*) was not reported; the initial decision of the Administrative Law Judge which it affirms (Appendix D, *infra,* pp. d-1 *et seq.*) was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1977 (App. A, p. a-2) and an order denying a timely petition for rehearing was entered on March 31, 1977 (App. B, p. b-1). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 (1) and 2350(a).

QUESTION PRESENTED

Common carriers by railroad have no statutory duty to establish through routes or through rates with common carriers by motor vehicle, and the Interstate Commerce Commission ("Commission") has no authority to require the establishment of through routes between such carriers or to prescribe rail proportional rates applicable to shipments having a prior or subsequent movement by motor carrier. Pursuant to the Transportation Act of 1940, common carriers by railroad have a statutory duty to establish through routes with each other and with common carriers by water and may be required to do so by the Commission. The Commission also has authority, antedating the 1940 Act, to prescribe rail proportional rates applicable to ship-

ments which may move by rail and water between any two points in the United States.

In the instant case, the involved eastern railroads (operating between Chicago and eastern points) have not established through rates with motor carriers for the movement of wheat from country origins to eastern destinations via transit stops for processing in Chicago. They have, however, established through rates with other railroads and with common carriers by water for such movements and have published proportional rates, as their division of the through rates, for the rail transportation service performed between Chicago and eastern destinations. The question presented is whether the maintenance of proportional rates applicable only as part of the through rates so established, and lower than corresponding local rates applicable to wheat arriving by motor carrier at Chicago, is a *per se* violation of Section 2 of the Interstate Commerce Act.

STATUTE INVOLVED

Section 2 of the Interstate Commerce Act (49 U.S.C. § 2) provides:

> "§2. Special rates and rebates prohibited.
>
> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common car-

rier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

STATEMENT OF THE CASE

This case arose upon a complaint filed with the Interstate Commerce Commission by the Board of Trade of the City of Chicago against the eastern railroad petitioners below. To the extent at issue herein, the complaint alleged essentially that the maintenance of proportional rates [1] by the railroads on outbound movements of wheat and wheat products from Chicago to eastern destinations, which applied in the case of wheat which had arrived at Chicago from country origins by rail or water carrier on interstate rates but not in the case of wheat arriving at Chicago by motor carrier, was unlawful. Complainants alleged that the railroads' refusal to apply the lower proportional rates to such motor carrier-arrived wheat, applying instead the higher local rates applicable to all shipments of wheat or wheat products deemed to originate at Chicago, was violative of Sections 1, 2, and 3(1) of the Interstate Commerce Act ("Act") 49 U.S.C. §§ 1, 2, and 3(1).

The rail rate structure complained of herein has been maintained in virtually the same form for ap-

---

[1] A proportional rate is a carrier's division of a through rate charged for through transportation over a through route and may be used only as such. *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458 (1935). See *Grain Proportionals, Ex-Barge To Official Territory*, 246 I.C.C. 353, 370, *modified*, 248 I.C.C. 307 (1941), *rev'd sub nom. Inland Waterways Corp.* v. *United States*, 44 F.Supp. 368 (N.D. Ill. 1942), *rev'd*, 319 U.S. 671 (1943), and cases cited therein. A proportional rate is dependent for application upon (1) a previous transportation to the point from which it applies, (2) a subsequent transportation from the point to which the proportional rate applies, or (3) both. *Omaha Grain Exc.* v. *Chicago, B. & Q. R. Co.*, 322 I.C.C. 743, 747 (1964), *rev'd on other grounds*, 242 F.Supp. 414 (N.D. Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966).

proximately 70 years. See *Cooperative Grange League Fed. Exc.* v. *Akron, C. & Y. R. Co.*, 323 I.C.C. 174, 179-82 (1964). Eastern railroads have, throughout that time, maintained proportional rates applicable as part of all-rail through rates from country origins beyond Chicago to the eastern destinations. The through rates thus established as combinations of local and proportional rates are for the purpose of equalizing the through rate from country origins to eastern destinations as between grain which is shipped direct from the farm and grain which is stopped in transit for storage or processing. In *American Barge Line Co.* v. *Alabama G.S.R. Co.*, 303 I.C.C. 463, 466 (1958), *rev'd in part on other grounds,* 306 I.C.C. 167 (1959), *aff'd,* 194 F.Supp. 438 (D.Kan. 1961), the Commission said:

> The consumption of grain is nationwide, but its greatest production is concentrated in limited surplus areas which compete with each other for sale of the grain in the deficit markets of the East and South. While the demand for grain is constant throughout the year, it is marketed principally during the first 2 or 3 months after harvest. At that time the surplus grain must be collected and stored at convenient locations, from which it is released throughout the remainder of the year as the demand arises. The grain while in storage must be free to move out in competition with grain still on the farm and with other stored grain at no disadvantage in rates. This made necessary the elaborate transit and rate equalizations found in the present railroad grain-rate structures. These rate structures were evolved over the years as a result of experience and litigation before this Commission and the courts. They are fully explained in our reports and in the western and southern grain cases, 205 I.C.C. 301, 215 I.C.C. 83, and 259 I.C.C. 629.

The eastern railroads have not established through routes with motor carriers nor maintained proportional rates applicable to outbound movements of grain which arrive in Chicago by motor carrier.

In support of the assailed rate structure, the railroads relied principally on the holding of this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943). In that case, where railroads maintained proportional rates for transportation from Chicago to eastern destinations applicable to grain arriving at Chicago by rail or lake vessel, which rates were lower than the local rates applied by the railroads for the same transportation service provided for all other shipments, including those arriving by barge at Chicago, this Court held that the rate disparity was not *per se* unlawfully discriminatory under Section 2 of the Interstate Commerce Act.

The Chicago Board of Trade urged that the holdings of *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), and *James McWilliams Blue Line* v. *United States*, 100 F.Supp. 66 (S.D.N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952) were controlling. *Mechling* was a case arising after *Inland Waterways* and after the Commission, pursuant to its authority under Section 6(11)(b) of the Act, 49 U.S.C. § 6(11)(b), prescribed rail proportional rates applicable to grain arriving by barge at Chicago which were higher than the corresponding proportional rates for ex-rail or ex-lake grain. This Court held in *Mechling* that a disparity between such proportional rates, in the absence of a justification based on cost of services, violated Section 3(4) of the Act, which prohibits discrimination against the traffic of a connecting carrier, and also violates Section 2 of the Act, which prohibits

railroads from charging one person more than another for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . . ." The decision in *Blue Line*, under similar facts, followed *Mechling*.

After hearing, the Administrative Law Judge found (App. D, p. d-30) that:

> [I]t makes no difference to the Eastern Railroads how the wheat arrived at the elevator or mill. Their service is exactly the same on the Chicago-to-the-east move whether the wheat arrived at the mill or elevator by rail, water or truck and thus the costs are the same.

Solely on the basis of that finding, that the costs to the eastern railroads for the physical handling of motor carrier-arrived wheat was the same as their costs for the handling of rail-arrived and water-arrived wheat, the Administrative Law Judge concluded that he was bound by the results in *Mechling* and *Blue Line* and that the rate differential constituted a *per se* violation of Section 2 of the Interstate Commerce Act.

The Administrative Law Judge made no findings contrary to the position of the railroads that they maintained through routes with the inbound rail and water carriers involved in the through movement of grain, nor was any issue raised as to the long-standing view that stops in transit for the processing of wheat and other grain do not interrupt the through character of such movements. The conclusions and findings of the Administrative Law Judge, adopted by the Commission as its own (App. C., p. c-2), were thus premised exclusively on the existence of a differential between the involved local and proportional rates for the same physical handling of shipments without a demonstrated

difference in costs to the eastern railroads. The existence of through routes and the nature of the proportional rates as divisions of through rates applicable over such routes was not contested.

The railroads sought judicial review of the Commission's decision before the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §§ 2321(a) and 2342(5). As had the Commission, the Court of Appeals determined that the case was controlled by *Mechling* and *Blue Line*. It thus held that the rate differential at issue was unlawfully discriminatory as a matter of law under Section 2. The Court of Appeals concluded (App. A, p. a-10):

> We reject petitioners' characterization of *Mechling* and *Blue Line* as being limited to barges or comparisons between through rates. Rather, we read those cases to hold that different rates may not be charged similarly situated shippers for the same service, based on the mode of transportation used in a prior or subsequent movement, where the cost of providing the service is the same. In view of the conceded similarity in costs and circumstances in this case, *Mechling* and *Blue Line* compel a finding of discrimination under section 2. Petitioners' argument that the truck-rail transportation of grain is a local movement whereas the rail-barge, lake-rail movement is a through movement is beside the point. *Cf. ICC* v. *Mechling, supra,* 330 U.S. at 577.

At the same time, the Court of Appeals, somewhat equivocally,[2] stated (App. A, p. a-10):

---

[2] In a final, catch-all finding, the Court of Appeals said, "In any event, to the extent that *Inland Waterways* is inconsistent with *Mechling* and *Blue Line*, we are bound by the Supreme Court's latest pronouncements as reflected in the latter [footnote omitted]." (App. A, pp. a-10 - a-11.)

> We do not view *Inland Waterways* as being inconsistent with *Mechling* and *Blue Line*.

It justified this view on the basis that (*Id.*):

> In that case [*Inland Waterways*] the petitioners focused more on the origin of the grain as the basis of the discrimination than on the mode of transportation into Chicago.

The view is simply not supported by this Court's statement of the facts in *Inland Waterways*, 319 U.S. at 673-76.

The Court of Appeals denied petitions for rehearing filed by petitioners and intervenor-petitioner below. (App. B, p. b-1.)

Petitioner American Bakers Association (ABA), an intervenor-petitioner in the case before the Court of Appeals below, is a trade association comprising over 300 member companies which produce and distribute bread and bakery products throughout the United States. ABA members operate bakeries in forty-nine states and have a combined output of approximately 70 percent of the nation's total bakery production. The principal ingredient of the bread and other bakery products produced by the ABA members is wheat flour, one of the commodities to which the involved rates apply. The annual freight bill of all of the ABA members for the railroad movement of wheat flour exceeds 175 million dollars. ABA members also utilize the nation's railroads for the movement of numerous other commodities, including lard, corn sugar, beet sugar, cane sugar, shortening, and corn starch.

Following the Commission's decision herein, the railroads concluded that the alleged unjust discrimination could be cured only by cancelling all propor-

tional rates on movements of grain from Chicago to eastern destinations and announced a formal tariff proposal to that effect. It is estimated that such cancellation of the proportional rates applicable to the wheat flour movements of ABA members would add 20 million dollars annually to the transportation costs of the ABA members. The railroads' proposed cancellation was held in abeyance when the effective date of the Commission's order herein was stayed pending completion of judicial review of the Commission's decision. ABA's participation in these proceedings is thus for the purpose of protecting the interests of its members in preserving the benefits of the rail proportional rates now available to them.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

The Court Of Appeals Has Decided A Federal Question In A Way Which Conflicts With The Applicable Decisions Of This Court.

The Court of Appeals based its decision in these proceedings on the erroneous view that this Court's decision in *Mechling,* and its *per curiam* affirmance in *Blue Line,* are dispositive of the issue presented. In so doing, it declined to follow this Court's decision in *Inland Waterways,* a case which is squarely in point, whose continuing validity has never been questioned by this Court, and which is clearly distinguishable from the cases which the Court of Appeals found to be the "latest pronouncements" of this Court on the issue at hand.

The substantive issue presented to the Court of Appeals was whether, as a matter of law, the application of a proportional rate by a railroad to shipments of wheat over its line, when such wheat arrives by rail or

water carrier at the point of interchange, is unlawfully discriminatory under Section 2 of the Interstate Commerce Act when the railroad applies no proportional rate, but only its higher local rate, to similar shipments tendered to it for transportation between the same points on its line after arrival by motor carrier. It should be emphasized at the outset that the rate differential alleged to be discriminatory herein is not a differential between proportional rates applicable over a common rail leg of two coterminus through routes as was the case in *Mechling* and *Blue Line*. The differential under attack is one between a proportional rate, on the one hand, maintained as part of a through rate for traffic moving on a through route[3] from a point on one carrier's line to a point on another carrier's line, and a local rate, on the other hand, applicable to shipments to which no

---

[3] "A through route is an arrangement, express or implied, between connecting carriers for the continuous carriage of goods from an origin on the line of one carrier to a destination on the line of another. The establishment of a through route requires the maintenance also of reasonable through rates. . . . No formal agreement is necessary. The through route need not be specified in the tariff. A joint rate is not needed; a combination of separately established factors is sufficient." *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 772, (1955). The establishment of proportional rates restricted to traffic having a prior movement over the line of a connecting carrier "necessarily reflect[s] agreement, express or implied, between the connecting carriers to establish a through route for continuous carriage from origin on one to destination on the other." *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458, 460 (1935). The establishment of proportional rates by the eastern railroads applicable to traffic having a prior movement by connecting railroads from country origins to Chicago may thus be presumed to reflect the establishment of through routes. No factual issue has been raised below as to the existence of such through routes nor has any factual showing been made which would tend to rebut this presumption.

through rate applies and for which no through route has been established. Contrary to the view of the Court of Appeals, the question whether the two rates apply for "exactly the same transportation service" provided by the eastern railroads is not dispositive of the discrimination question under Section 2. Rather, the question which is required to be resolved is whether the transportation service rendered by the eastern railroads on local traffic and the service rendered on through traffic are provided under "similar circumstances and conditions." The Court of Appeals, in clear error, found that this critical question is "beside the point". (App. A, p. a-10.)

It has long been recognized that a carrier's division of a through rate, which is precisely what a proportional rate is, *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458, 460 (1935), is not the basis on which the reasonableness of that carrier's local tariff for the same services is determined, *Chicago & N.W. Ry. Co.* v. *Osborne*, 52 F. 912 (8th Cir. 1892), and that a carrier's portion of a through rate may be less than its local rate for the same services without thereby resulting in an unjust discrimination. *Parsons* v. *C. & N.W. Ry. Co.*, 167 U.S. 447 (1897); *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896); *Southwestern Missouri Millers' Club* v. *St. L. & S.F. R. Co.*, 29 I.C.C. 28, 29 (1914). When carriers collaborate to establish a through rate, the through route over which such rate applies is treated in effect as "a new and independent line." *Osborne, supra*, at 914. The "circumstances and conditions" attending the movement of shipments over a portion of such a "new and independent line" by one of the participating carriers are not the same "circumstances and condi-

tions" attending the movement of shipments between the same points by that carrier when the shipments are first tendered at an intermediate point on the route over which the through rate applies. *Kentucky & Indiana Bridge Co.* v. *Louisville & N.R. Co.*, 37 F. 567, 632 (D. Ky. 1889), *app. dismissed*, 149 U.S. 777 (1893); *see Union Pac. R. Co.* v. *United States*, 117 U.S. 355 (1886). The rendering of identical transportation services with respect to through traffic and local traffic, therefore, in no way suggests that the "circumstances and conditions" attending the movement of the two descriptions of traffic are "substantially similar."

The longstanding recognition which has been given the validity of proportional rates lower than corresponding local rates was affirmed by this Court in *Inland Waterways*, the only case decided by this Court which construes Section 2 of the Act as it applies to a rail carrier's determination to establish proportional rates only for traffic having a prior movement by a particular mode on interstate rates while regarding all other traffic as local traffic and maintaining higher local rates applicable thereto. Rather than follow *Inland Waterways*, however, the Court of Appeals either determined that the case had been implicitly overruled or it misread the case as being factually distinguishable from the instant case.

In *Inland Waterways*, the Commission had refused to suspend certain amendments to railroad tariffs which terminated the application of proportional rates to ex-barge shipments of grain for reshipment from Chicago to eastern destinations. The amendments required the application of the railroads' local rates to such shipments, just as such local rates were applic-

able to any other shipments deemed to originate at Chicago. The change, in effect, terminated the through routes which had previously existed, as implied by the maintenance of through rates and facilities for interchange, over the lines of the rail and barge carriers. The Commission upheld the termination of proportional rates for ex-barge traffic against the claim of the barge operators that the maintenance of different local and proportional rates applicable to the identical physical handling of shipments by the involved railroads was an unlawful discrimination under Section 2 of the Act. The Commission at the same time recognized that, in "a proper proceeding", it could and would entertain a proposal by the barge operators that the Commission prescribe proportional rates applicable on the rail portion of the ex-barge movements of grain.[4] Upon reconsideration, and despite the urgings of the barge carriers that the newly enacted Transportation Act of 1940 (which, under Section 3(4) of the Act, prohibited discrimination by railroads against the traffic of "connecting carriers", a term defined to include railroad and water carriers), required a different result, the Commission upheld its earlier determination on the basis that the protesting barge operators had not offered any evidence or made any proposal for the establishment of proportional rates for the ex-barge rail movements.

---

[4] Under Section 6(11)(b) of the Act, 49 U.S.C. § 6(11)(b), the Commission has authority to prescribe proportional rates applicable to traffic which may move by rail and water common carriers between points in the United States. This provision antedates the regulation of common carriers by water provided for in the Transportation Act of 1940 and does not require for its operation that the involved water carrier hold any particular status under any regulatory legislation.

While the specially constituted three-judge district court enjoined the Commission's order vacating the already-expired suspension of the proposed tariffs, this Court reversed the decision of the district court. The Court held that proportional rates lower than local rates for the same transportation service are not *per se* unlawful under Section 2 of the Act, as was contended by the barge operators. The Court said (319 U.S. at 684-85):

> Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points. The practice of routing commodities such as grain to centers for marketing and processing has been widespread and often a necessary feature of the process of distribution. In many instances stopovers for marketing and processing have not been considered as disrupting the continuity of transportation to move distant points, and consequently the grain has been allowed to move on at a rate lower than the outbound rate on grain originating locally and not from a distance. To get the outbound business competing carriers frequently would offer rates similarly computed. Proportional rates established on this reasoning have become deeply embedded in the transportation system of the country, and have been approved by the Interstate Commerce Commission, by the federal courts, this one included; and, so far as it has spoken on the subject, by Congress itself. We see no reason for repudiating them now. [Footnotes omitted.]

At the same time, the Court recognized, as had the Commission, that the claim of discrimination under

Section 2 could be viewed in quite a different light if the Commission were to exercise its statutory authority under Section 6(11)(b) to prescribe rail proportional rates applicable to the ex-barge traffic. It noted, however (319 U.S. at 690-91), that:

> The issue raised by the position of the parties did not call for a fixing of new combination rates, for it was contended barge grain was entitled to the existing proportionals.

In the *Mechling* case the issue presented to the Court was distinctly different from that presented in *Inland Waterways*. Following the *Inland Waterways* decision, the Commission did institute a "proper proceeding" to determine whether, under Section 6(11)(b), it should prescribe rail proportional rates for the same ex-barge shipments of grain involved in *Inland Waterways*. *Grain Proportionals, Ex-Barge to Official Territory*, 262 I.C.C. 7 (1945), *rev'd sub nom. Mechling* v. *United States* (N.D. Ill., Nov. 26, 1945), *aff'd*, 330 U.S. 567 (1947).[5] The Commission concluded that proportional rates should be prescribed, but it also concluded that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals to the extent warranted by differences in competitive circumstances attending the through movements by differing modes. 262 I.C.C. at 27. This Court, on appeal from the decision of a three-judge district court which enjoined enforcement of the Commission's order to the extent that it permitted a variance between the proportional rates prescribed for ex-barge traffic and

---

[5] The Commission in the same proceeding also considered whether *joint* barge-rail rates should be prescribed under its then recently-enacted authority provided in Sections 15(3) and 307(d) of the Act, 49 U.S.C. §§ 15(3)and 907(d). It was agreed by the parties and concluded by the Commission that no such joint rates should be prescribed. (262 I.C.C. at 10, 32.)

the proportional rates applicable on ex-rail and ex-lake traffic, was thus faced solely with the issues of whether the Commission may lawfully prescribe, or the railroads lawfully maintain, *proportional* rates applicable on ex-barge traffic as well as on ex-rail and ex-lake traffic which vary as between the ex-barge traffic, on the one hand, and the ex-rail and ex-lake traffic, on the other.[6]

In *Mechling,* then, where varying proportional rates had been prescribed for the common rail segment of coterminus through routes, such variance based solely on the mode of the prior movement by a statutory connecting carrier, this Court held, first, on the basis of the Section 3(4) prohibition of discrimination against the traffic of a connecting carrier and, secondarily, on the basis of the Section 2 prohibition against rate discrimination for "a like and contemporaneous service of a like kind of traffic under substantially similar circumstances and conditions," that the differential between the two sets of proportional rates was unlawful. "Similar circumstances and conditions" could be found to exist for the common rail movements because through rates had been established for both movements. This had not been the case in *Inland Waterways.*

The *Blue Line* case, also cited by the Court of Appeals as compelling its decision herein, correctly followed *Mechling* but, like *Mechling,* is inapposite in the instant case. In terms of further exposition of the circumstances which constitute a *per se* violation of Section 2, it stands only for the proposition that a rail-

---

[6] With respect to the Commission's decision that proportional rates *should* be prescribed, the Court noted (330 U.S. at 572) that, "This part of the Commission's order has not been challenged". There was, moreover, no question whether the Commission had the authority to prescribe rail proportional rates.

road's publication of *proportional* rates at differing levels for the same physical handling of shipments is unlawful when the difference is based on the mode of transportation employed in a *subsequent* movement just as it was in *Mechling* when based on the mode employed in a *previous* movement.

In *Blue Line,* the so-called "Pocohontas Railroads" operating from the coal mines of Virginia, West Virginia and Kentucky to the Hampton Roads ports had established proportional rates for coal moving over their lines to the Hampton Roads ports and subsequently by ocean to New England ports and finally by either rail or barge to interior points. The proportional rates applicable when the final leg was by barge were higher than the proportional rates which applied when the final leg was by rail. Both sets of rates, however, were *proportional* rates. *James McWilliams Blue Line* v. *Campbell's Creek Railroad Company,* 278 I.C.C. 312, 313 (1950), *rev'd,* 100 F.Supp. 66 (S.D. N.Y. 1951), *aff'd per curiam,* 342 U.S. 951 (1952). Thus the three-judge district court correctly noted that:

> The only factual difference between the *Mechling* case and the case at bar is that in the *Mechling* case the rates charged for rail transportation were dependent upon the means used to accomplish the prior movement of the shipment while here the rates are made dependent upon the means used to accomplish the subsequent movement of the shipment.

Moreover, as in *Mechling,* while the Commission could not regulate "Blue Line's" barge rate under Part III of the Act, as the district court noted (100 F.Supp. at 70), that fact did not preclude the decision reached, first, because the railroads *had* established proportional rates, and because, in any event, the Com-

mission had the authority, under Section 6(11)(b), to prescribe the establishment of rail proportional rates despite its lack of Part III jurisdiction over the barge (and ocean) carriers. While the district court noted that the decision in *Mechling* was reached independently of the Commission's jurisdiction over barge carriers, the result was not reached independently of the fact that proportional rates had been established; they were established by the Commission's action under its Section 6(11)(b) authority. In *Blue Line,* then, where the railroads had by their own actions voluntarily established proportional rates for the two coterminus through routes, the existence of differing *proportional* rates applicable for the same portion of those through routes likewise required a finding of a discrimination under Section 2 because the relevant "circumstances and conditions"—those relating to the through rate—were the same.

In the instant case, the involved railroads and motor carriers have clearly not established through routes or through rates by any voluntary action. Moreover, in the barge cases on which the Court of Appeals has relied, the Commission had authority to prescribe rail proportional rates, applicable in connection with water carrier movements. It has no analogous authority in this case. The instant case, therefore, is in a posture entirely different from that of *Mechling* and *Blue Line* cases. The relevant "circumstances and conditions" to be compared herein are those relating to a through rate on the one hand and a local rate on the other hand. These "circumstances and conditions" are clearly different inasmuch as a long haul is involved in the case of the proportional rates while a short haul is involved in the case of local rates. Nevertheless, the Court of Appeals refused to consider this fact in reaching its decision.

In summary, the question whether a railroad may maintain proportional rates for traffic moving on through routes which it has established while at the same time maintaining local rates for all other traffic, including that for which the railroad may not be required to establish through rates, has been clearly and correctly resolved in the affirmative by this Court in *Inland Waterways,* and the validity of that resolution has never been questioned by this Court nor otherwise disturbed by either *Mechling* or *Blue Line.* The failure of the Court of Appeals to follow *Inland Waterways* in deciding the question before it is thus a compelling reason for the writ of certiorari to issue in this case.

II

The Decision Of The Court Of Appeals Is In Conflict With, And In Effect Nullifies, A Section Of The Interstate Commerce Act.

Section 6(11) is the only section of the Interstate Commerce Act which expressly mentions proportional rates. It provides that, when property may be or is transported in interstate commerce by rail and water between points in the United States by common carrier, the Commission shall have jurisdiction over both the rail and water carriers and shall have jurisdiction:

> (b) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

The statute thus expressly contemplates a disparity between rail proportional rates prescribed by the Commission when prior or subsequent water movements are involved and rail local rates applicable to all other rail movements between the same points on which the proportional rates apply. The Court of Appeals decision is in direct conflict with this statutory recognition that a disparity between proportional and local rates may exist and, in fact, may be required, irrespective of whether there is any difference in the cost of providing the involved service.

In ignoring the position of the railroads that through traffic, to which proportional rates apply, and local traffic, to which local rates apply, are not handled under "similar circumstances and conditions," the Court of Appeals held flatly that, in the absence of a difference in costs, Section 2 prohibits any disparity in rail rates applicable between the same points when the involved traffic is moving, by whatever mode, from the same ultimate origins to the same destinations. If the decision of the Court of Appeals is not reversed, it would effectively tie the hands of the Commission in its exercise of its Section 6(11)(b) authority to establish ex-water proportional rates which, in the words of the statute, "differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water." Thus, while the Commission is expressly authorized by Section 6(11)(b) of the Act to prescribe certain proportional rates, if it should do so, the resulting rate structure could, following the Court of Appeals decision, be found *per se* unlawful under Section 2 solely on the basis of a showing that traffic similar to that to

which the prescribed proportional rates apply may also move by motor-rail or rail-rail combinations between the same points in the United States. Such a showing would clearly be possible in most cases. The Court of Appeals decision would, in effect, strip the Commission of the authority which Section 6(11)(b) expressly provides.

The Court of Appeals decision is thus not only in direct conflict with the statutory definition of a proportional rate set forth in Section 6(11)(b), the sole mention of such a rate made in the Interstate Commerce Act, but also actually nullifies the proportional rate prescription power granted to the Commission therein. A decision which has such effects clearly is required to be considered by this Court.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals is plainly in error, that it conflicts with an applicable decision of this Court, and that it requires a construction of the Interstate Commerce Act which conflicts with its plain meaning. For all of the foregoing reasons, the present petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB P. BILLIG
JOHN R. ATTANASIO
2033 K Street, N.W.
Washington, D.C. 20006
(202) 223-8270
Counsel for American Bakers Association

June 28, 1977

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1198

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, BURLINGTON NORTHERN INC., THE CHESAPEAKE & OHIO RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, WILLIAM GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR, GRAND TRUNK WESTERN RAILROAD CO., GREEN BAY & WESTERN RAILROAD CO., THE KANSAS CITY SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD, MISSOURI-KANSAS-TEXAS RAILROAD CO., MISSOURI PACIFIC RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION CO., TEXAS & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD, THE WESTERN PACIFIC RAILROAD COMPANY,

Petitioners,

On Petition for Review of Orders of the Interstate Commerce Commission

AMERICAN BAKERS ASSOCIATION, ANHEUSER-BUSCH, INC., THE BOARD OF TRADE OF KANSAS CITY, MISSOURI,

Intervenors-Petitioners,

v.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION,

Respondents,

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervenor-Respondent.

On Petition for Review of Orders of the Interstate Commerce Commission

Submitted: December 16, 1976

Filed: February 24, 1977

Before STEPHENSON and HENLEY, Circuit Judges, and MEREDITH,* District Judge.

STEPHENSON, Circuit Judge.

Petitioners seek to review and set aside orders of the Interstate Commerce Commission (ICC) declaring certain railroad rates for the shipment of wheat eastward from Chicago to be unlawfully discriminatory and directing that the discrimination be removed.[1] The principal issue before us is whether the Commis-

*The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri, sitting by designation.

[1]The orders were entered in proceedings styled *Board of Trade of the City of Chicago v. The Akron, Canton & Youngstown R.R. Co., et al.*, Docket No. 35825. We have jurisdiction pursuant to 28 U.S.C. §§2321(a) and 2342(5). Venue is proper in this court in that several of the petitioning railroads have their principal offices in this circuit. 28 U.S.C. §2343.

sion erred in finding the rates to be discriminatory as a matter of law in violation of section 2 of the Interstate Commerce Act, 49 U.S.C. §2.[2]

This controversy centers around the dual rate structure maintained by the petitioning railroads for the eastward reshipment of wheat originally shipped to Chicago from points west. Wheat arriving in Chicago by rail, lake steamer or barge is treated as having originated west of Chicago and is accorded a through or proportional rate for reshipment to the east.[3] Wheat arriving in Chicago by motor carrier and reshipped to the east is treated as having originated in Chicago and is charged a local rate. In 1973, the proportional rate for wheat shipped from Chicago to New York was 81.5 cents per hundredweight. The local rate for the

---

[2]49 U.S.C. §2 provides:

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

[3]A through route is an arrangement between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to a destination on the line of another. The sum of the charges for the entire movement is the through rate. Each carrier's charge for its part of the through movement is a portion of the through rate and is often referred to as a proportional rate. *See generally Thompson v. United States*, 343 U.S. 549, 556–57 (1952); *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 772–75 (1955).

same movement was 98 cents. It is undisputed that the cost of service to the railroads for the eastward transportation of wheat from Chicago does not vary according to the manner in which the wheat was shipped to Chicago. All wheat arriving in Chicago is deposited in the same elevators and thereafter loses its identity.

In 1973, the Chicago Board of Trade filed a complaint with the ICC, alleging, *inter alia*, that the dual rate structure as it affected motor-carrier-arrived wheat at Chicago was unreasonable and discriminatory, and thus in violation of sections 1, 2 and 3(1) of the Interstate Commerce Act, 49 U.S.C. §§1, 2 and 3(1). The matter was referred to an administrative law judge, who, after hearings, found that the aforesaid rates were unjustly discriminatory in contravention of 49 U.S.C. §2.[4] The hearing examiner stated that his decision was compelled by *ICC v. Mechling*, 330 U.S. 567 (1947); and *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd per curiam*, 342 U.S. 951 (1952); cases which he viewed as indistinguishable from the instant controversy. The railroads were directed to remove the unlawful discrimination.

The hearing examiner's decision was affirmed and adopted by Division 2 of the Commission. Thereafter, petitioners sought and

---

[4]The hearing examiner stated his findings as follows:

> The Administrative Law Judge finds that the maintenance of the assailed proportional or reshipping rates and charges from Chicago, Ill., to points in the eastern United States, as set forth in the defendant railroads' tariffs, on wheat and wheat products, in carloads, where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge, without maintaining like rates and charges, at the same levels, and from and to the same points on the same commodities where the prior movement to Chicago is by for-hire motor carrier, is unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act; and that the assailed rates and charges are not shown to be otherwise unlawful.

were denied review by the full Commission. The Commission, however, stayed the effective date of the relief ordered pending the completion of judicial review. This petition for review, filed by the affected railroads, followed.[5]

49 U.S.C. §2 prohibits carriers from charging different rates for doing "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . . ."[6] Petitioners contend that wheat reshipped by rail after arriving in Chicago by rail, barge or lake steamer is a through movement,[7] whereas wheat arriving by truck and reshipped by rail is a local movement. Based on that distinction, and on the fact that the Interstate Commerce Act requires rail and water carriers to establish through routes with each other, 49 U.S.C. §§1(4) and 905, but does not require those carriers to establish through routes with motor carriers,[8] petitioners argue that the circumstances of truck-rail transportation on the one hand and rail, barge, lake-rail transportation on the other are dissimilar, and that section 2, therefore, does not require that the respective rates be the same. They argue that *Mechling* and *Blue Line* are inapposite in that those cases concerned barges and did not involve the through-local distinction presented here, and that the controlling case which mandates a finding of no discrimination is *ICC v. Inland Waterways Corp.*, 319 U.S. 671 (1943). Respondents urge that since the physical transportation of wheat eastward from Chicago and the cost thereof is the same regard-

---

[5]We granted leave to intervene as petitioners to the American Bakers Association, Anheuser-Busch, Inc., and The Board of Trade of Kansas City, Missouri; and leave to intervene as a respondent to the Board of Trade of the City of Chicago.

[6]The text of 49 U.S.C. §2 is set forth at note 2, *supra*.

[7]See note 3, *supra*.

[8]Under 49 U.S.C. §316(c), establishment of such through routes is permitted but not required.

less of the mode of transportation by which it arrived, the characterization of one movement as through and the other as local is of no consequence, and that the Commission properly declared the rates to be discriminatory in accordance with *Mechling* and *Blue Line*.

We turn to an examination of the cases urged by each side as controlling.

Inland Waterways concerned the legality of railroad rates for the reshipping of grain eastward from Chicago. The railroads filed tariffs which applied proportional reshipping rates to grain arriving at Chicago by rail or lake steamer, and local rates to grain arriving by barge. In all cases, the local rates were higher than the proportional rates. After hearings on the proposed tariffs, the Commission sustained the rates, stating in part:

> Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial . . . and unduly preferential. . . . This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to the relative length and nature of the in-bound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.

319 U.S. at 681.

While the aforesaid Commission proceedings were pending, Congress enacted the Transportation Act of 1940, which, *inter alia*, conferred common carrier status on barge lines and required that they and the railroads enter into reasonable through routes with each other. 49 U.S.C. §§1(4) and 905. The barge lines sought reopening of the hearings or reconsideration on that basis, but were denied relief. Suit was then filed seeking to annul the Commission's approval of the new rates on grounds that the rates unlawfully discriminated against barges. The district court granted relief, 44 F. Supp. 368; however, the Supreme Court reversed. Mr. Justice Jackson, writing for the majority, stated in part:

> In the proceedings before the Commission the protestants pitched their case upon two propositions: (1) To deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same, no matter where the grain originated; . . . .
>
> As the Commission corectly observed with reference to the first contention, "to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned."
>
> Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. . . .
>
> * * *
>
> To sustain the injunction would require a holding that grain originating 60 miles from Chicago must as matter of law be given the benefit of proportionals fixed with reference to grain from the Northwest Territory, embracing points in Canada and as far west in the United States as Washington and the Dakotas. In addition to the disparity in distances, there is the further fact that the grain from the Northwest is predominately wheat, while that from the territory served by the barge lines is predominately corn from Illinois. Nothing in the Interstate Commerce Act as amended by the Trans-

> portation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

319 U.S. at 683–88.

The Court noted that it viewed neither the Commission's action nor its own as an approval of the then-existing rates, but rather as a determination that "the proposed schedules could not be struck down upon the erroneous view advanced by the protestants." 319 U.S. at 686. Mr. Justice Black dissented, stating that the rate structure unlawfully discriminated against barge traffic.

As noted above, the Commission, in the *Inland Waterways* proceedings, stated that while protestants' allegations could not be sustained, "in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combination." 319 U.S. at 681. Proceedings to that end ensued and formed the basis for the Supreme Court's decision in *ICC v. Mechling, supra.* The Commission concluded that the proposed rate structure which contained an 8½ cent higher rate for ex-barge grain than for ex-rail or ex-lake grain was unlawful. It further concluded, however, that reshipping rates from Chicago for ex-barge grain would be reasonable and lawful even though they were 3 cents per hundredweight higher than the comparable rates for ex-rail and ex-lake grain. Various barge lines then instituted suit, contending that the order was void in that it approved higher rates for ex-barge grain without any showing that cost of transportation to the railroads was higher for such grain than for ex-rail or ex-lake grain. The district court sustained the petitioners' allegations and enjoined the Commission's order to the extent that it permitted the 3 cent differential. On appeal, the Supreme Court affirmed, relying in

part on 49 U.S.C. §2. Mr. Justice Black, writing for the majority, stated:

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. . . .
>
> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. For while Chicago is a great grain center, it cannot consume all barge-transported grain. That grain, like other grain coming to Chicago for marketing or processing, is reshipped to distant destinations.

330 U.S. at 577. Justices Frankfurter and Jackson dissented.

The third case relied on by one or the other of the parties is *James McWilliams Blue Line, Inc. v. United States, supra.* That case concerned railroad rates for the transportation of coal mined in Virginia, West Virginia and Kentucky, to Hampton Roads ports, then to New England ports, and finally to interior ports. Shippers moving coal by rail to Hampton Roads, then by ocean barge to the New England ports, and then by barge to its ultimate destination (rail-ocean-barge) were charged 45 cents per ton more for the initial rail transportation than those who used rail transportation for the third and final leg of the movement (rail-ocean-rail). All parties conceded that the railroads' cost of trans-

porting the coal to Hampton Roads in the first instance was the same in both cases. On complaint, the Commission found no unlawful discrimination. In subsequent court proceedings, however, the district court held that the disparate rate structure was discriminatory in violation of 49 U.S.C. §2, stating that the case was indistinguishable from *ICC v. Mechling, supra. See James McWilliams Blue Line, Inc. v. United States, supra,* 100 F. Supp. at 70. The Supreme Court affirmed *per curiam.* 342 U.S. 951 (1952).

Based on our reading of the statute and of the cases urged by each side as controlling, we agree with the Commission that the rates here under attack are discriminatory as a matter of law under 49 U.S.C. §2. We reject petitioners' characterization of *Mechling* and *Blue Line* as being limited to barges or comparisons between through rates. Rather, we read those cases to hold that different rates may not be charged similarly situated shippers for the same service, based on the mode of transportation used in a prior or subsequent movement, where the cost of providing the service is the same. In view of the conceded similarity in costs and circumstances in this case, *Mechling* and *Blue Line* compel a finding of discrimination under section 2. Petitioners' argument that the truck-rail transportation of grain is a local movement whereas the rail-barge, lake-rail movement is a through movement is beside the point. *Cf. ICC v. Mechling, supra,* 330 U.S. at 577.

We do not view *Inland Waterways* as being inconsistent with *Mechling* and *Blue Line.* In that case the petitioners focused more on the origin of the grain as the basis of the discrimination than on the mode of transportation into Chicago. Both the Commission and the Supreme Court stated that their holdings did not connote approval of the rates, but only that petitioners' assertions could not be sustained. In any event, to the extent that *Inland Waterways* is inconsistent with *Mechling* and *Blue Line,* we are bound

by the Supreme Court's latest pronouncements as reflected in the latter.[9]

The petition to review and set aside the orders of the Interstate Commerce Commission is denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[9]Petitioners additionally contend that the Commission erred in failing to consider the disruptive consequences of its decision on the national grain rate structure. In view of our holding that the Commission's decision was mandated by *Mechling* and *Blue Line*, we find no merit to this contention.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1198

September Term, 1976

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. MCARTHUR; BURLINGTON NORTHERN INC., THE CHESAPEAKE & OHIO RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD COMPANY, DENVER RIO GRANDE WESTERN RAILROAD COMPANY, WILLIAM GIBBONS, TRUSTEE OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR, GRAND TRUNK WESTERN RAILROAD CO., GREEN BAY & WESTERN RAILROAD CO., THE KANSAS CITY SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD, MISSOURI-KANSAS-TEXAS RAILROAD CO., MISSOURI PACIFIC RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, THOMAS F. PATTON AND RALPH F. TYLER, JR., ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION CO., TEXAS & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD, THE WESTERN PACIFIC RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION,

Petitioners,

On Petition for Review of Orders of the Interstate Commerce Commission

ANHEUSER-BUSCH, INC., THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., and AMERICAN BAKERS ASSOCIATION,

Intervenors-Petitioners,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents,

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervenor-Respondent.

On Petition for Review of Orders of the Interstate Commerce Commission

This cause came on to be heard on petition for review of orders of the Interstate Commerce Commission and briefs filed by the respective parties and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the petition to review and set aside the orders of the Interstate Commerce Commission is denied.

February 24, 1977

A true copy.

Attest:

ROBERT C. TUCKER

Clerk, U. S. Court of Appeals, 8th Circuit.
April 7, 1977

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1198

September Term, 1975

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

Petition for Review of Orders of the Interstate Commerce Commission.

Petitions of petitioners and intervenor-petitioner for rehearing filed in this cause having been considered, it is now here ordered by this Court that the petitions for rehearing be, and they are hereby, denied.

March 31, 1977

APPENDIX C

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 14th day of January, 1976.

No. 35825

BOARD OF TRADE OF THE CITY OF CHICAGO

v.

THE AKRON, CANTON, & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Upon consideration of the complaint and the record in the above-entitled proceeding, including the initial decision and order of the Administrative Law Judge, the exceptions thereto filed by complainant, defendants, and by the western railroads, Peavey Company, and Archer Daniels Midland Company (intervenors), and the replies to the exceptions filed by complainant, jointly by defendants and the western railroads, intervenors, and Archer Daniels Midland Company, intervenor; and

It appearing, That the exceptions do not show any material errors in the Administrative Law Judge's statement and evaluation of the facts, his conclusions of law or findings, nor do they raise any material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his initial decision, and are not of such nature as to require the issuance of a report by Division 2 discussing the evidence and arguments advanced in the light of such exceptions;

Wherefore, and good cause appearing therefor;

We find, That the evidence considered in the light of the exceptions and the replies thereto does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, conclusions and the findings of the Administrative Law Judge, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That the proceeding be, and it is hereby, discontinued.

By the Commission, Division 2.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX D

OH

Interstate Commerce Commission

INITIAL DECISION

No. 35825

BOARD OF TRADE OF THE CITY OF CHICAGO

v.

THE AKRON, CANTON, & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Maintenance of the assailed proportional or reshipping rates from Chicago, Ill., to points in the eastern United States, as set forth in the defendant railroads' tariffs, on wheat and wheat products, in carloads, where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge without maintaining like rates and charges, at the same levels, from and to the same points on the same commodities where the prior movement to Chicago is by motor for-hire carrier, found unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act; and assailed rates and charges otherwise found not shown to be unlawful. Defendants ordered to cease and desist from the referred to violation and to publish appropriate tariffs removing such violation. Complaint in all other respects dismissed.

Harold E. Spencer and *Frank E. Polom* for complainant. *John J. Paylor* and *Richard A. Mehley* for eastern railroad defendants.

By Alvin H. Schutrumpf, Administrative Law Judge:

By complaint filed April 9, 1973, the Board of Trade of the City of Chicago alleges that the present rate structure on wheat and wheat products (as listed and defined in TL-CTR Tariff

600-I, I.C.C. C-168) covering (1) flat and proportional rates published in TL-CTR Eastern Grain Tariff C/TN 245-I, I.C.C. C-375, from Chicago to eastern basing points, viz: Albany, N. Y., Baltimore, Md., Belington, W. Va., Boston, Mass., Cumberland, Md., Hagerstown, Md., New York, N. Y., Newport News, Va., Norfolk, Va., Philadelphia, Pa., Rochester, N. Y., Rockland, Maine, Strasburg, Va., Syracuse, N. Y., Utica, N. Y., and points taking the same rates; (2) proportional rates from Chicago, Ill., as published in CTR Tariff 535-C I, I.C.C. 4495 to destinations named therein and points taking the same rates; and (3) flat rates, as published in the individual lines' tariffs of defendants to destinations covered by the last named tariff; are unlawful as hereinafter described. The railroads listed in Appendix A hereto were named as defendants.

Complainant alleges (1) that the maintenance and collection of such rates and charges were and still are unjust and unreasonable in violation of section 1 of the Act; unjustly discriminatory to wheat arriving at Chicago by rail from points beyond for further movement to the east in violation of section 2 of the Act; and unduly prejudicial to Chicago, to complainant and to its members, and to wheat and wheat products in violation of section 3(1) of the Act; and (2) that maintenance by defendants of proportional domestic rates as referred to above are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, unjustly discriminatory to motor-carrier-arrived wheat[1] at Chicago and the shippers of such wheat and wheat products made therefrom, in violation of section 2 of said Act, and unduly prejudicial to complainant and its members, to Chicago, and to motor-carrier-arrived wheat at Chicago in violation of section 3(1) of said Act.

Complainant seeks flat rates on wheat and wheat products from Chicago to eastern basing points uniformly 6.5 cents higher than the proportional rates, with the rates on wheat products being made one-half cent higher than those on wheat,

[1] Sometimes called ex-truck wheat, ex-truck wheat products, or ex-truck traffic.

and revision of the applicable tariffs so as to permit the application of the proportionals on motor-carrier-arrived wheat and wheat products with the additional provision that the proportional rates applicable are those in effect on the dates said shipments leave Chicago.

Answers to the complainant were filed by certain defendants.

The proceeding was referred to the Judge for hearing and the issuance of an appropriate order thereon. Hearing was held at Chicago, Ill., on January 7, 8, and 9, 1974. Evidence was submitted on behalf of complainant and on behalf of certain eastern railroad defendants. Briefs were filed.

The Board of Trade of the City of Chicago (hereinafter called the Board) is a corporation created by an Act of the Illinois legislature, with its principal business in Chicago, Ill. Its 1,402 members represent all segments of the grain and grain products industries and include terminals, storage operators, grain merchandisers, cash grain merchants, processors, millers, exporters, and producers who operate and maintain facilities within the switching limits of Chicago and who ship and receive grain and grain products in interstate and foreign commerce. The Board itself ships no wheat, wheat products, or like commodities.

On March 13, 1972, complainant submitted to the Eastern Railroads a proposal (a) for an adjustment in the spread between the flat and proportional rates on grain and grain products from Chicago to eastern trunkline territory and (b) for tariff amendment to permit the application of the proportional or reshipping rates from Chicago on grain and grain products shipments reaching Chicago via motor carriers. Ultimately these requests were denied and the complainant filed the instant complaint, the relief sought being limited to wheat and wheat products rates.

The grain rate structure from Central Freight Association territory, including Illinois, to the east was established many years ago and was originally based on what is commonly-known as the McGraham Formula. Basically, the key rates are the Chicago-New York proportional and flat rates. Proportional rates are made from Chicago to other eastern basing points predicated on a percentage and/or differential over or under the Chicago-New York rate. Historically, rates from other origins in official territory were made as a percentage of the Chicago flat rates and the origin area was assigned group numbers which basically reflected the percentage of the Chicago rates. These rates were published as one-factor rates and from Illinois origins the one-factor rates generally applied to their routes through Chicago.

Paragraph (a) of Item 520 Series of TPO Maurer's Tariff C/TN 245-I, I.C.C. C-375 specifies, as follows:

> Rates apply as reshipping or proportional rates applicable on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through bill shipments not stopped in transit at re-shipping points subject to this application.

This permits the use of the proportional rates from Chicago on traffic reaching Chicago via a rail or water transportation line. Rates also apply on through bill shipments not stopping at Chicago.

One of the governing factors in the utilization of the proportional rates from Chicago is that a combination of rail rate factors to and from Chicago may not be less than the flat or local rate from Chicago to the same destination. This has been referred to as the "pad" requirement, or minimum inbound pay-in requirement. This provision is set out in subparagraph (b) of Item 520, as follows:

> Provided that in no case shall the combination through rate to and from the re-shipping point via rail be less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, the difference necessary to protect such rate from the re-shipping point to be added to the re-shipping rate therefrom.

The rules established by the Board of Trade concerning futures contracts require that all grain delivered under these contracts must protect the rail proportional rates from Chicago to points in eastern territory.

While the rail carriers parties to the proportional rate from Chicago require a pad on rail shipments to Chicago, they do not maintain a pad requirement on inbound shipments arriving via water. Thus, water-arrived grain at Chicago has the same status as rail-grain insofar as the application of the proportional rates are concerned, but inbound water-arrived grain has the advantage over rail inbound grain in that there is no pad requirement.

Appendix B hereto sets forth the flat and proportional rates at various Ex Parte increased levels, together with the corresponding pads, on wheat and wheat products from Chicago to the basing point of New York City for the period March 1938 to date. Complainant points out that on March 10, 1960, the flat rate from Chicago to New York was reduced from 73.5 cents to 67 cents (column 2) resulting in a pad of 12 cents (column 4). Similarly, the flat rate on wheat products reflected the historic one-half cent higher rate of 67.5 cents (column 5). This adjustment is said to have been the outgrowth of Docket No. 32790, Fourth Section Application No. 35140 and related proceeding and was published in supplement 150 and 151, CTRTB 245-I, I.C.C. 4403.

Appendix C hereto shows the flat and proportional rates and corresponding pads on wheat from Chicago, Ill., to eastern

trunkline basing points from March 10, 1960, to August 19, 1973. While the pads to all basing points were uniform at the Ex Parte 212, 223, and 256 levels (columns 10, 9, and 8, respectively), this uniformity was not maintained subsequent to the Ex Parte 256 increase, although apparently the carriers had sought to make appropriate adjustments, but received opposition thereto from the Board and others.

Appendix D shows similar statistics for the same period with respect to wheat products from Chicago to eastern trunkline basing points.

The flat or local rail rates from Chicago are not used to ship wheat and wheat flour traffic from Chicago to the east because they are too high in relation to the proportional rates. They do, however, establish the pad which shippers must conform to on any traffic moving beyond Chicago on the proportional rates. For example, to utilize a proportional rate of 81.5 cents cwt. (X-295-A level, 8-19-73) on wheat from Chicago to New York, inbound the wheat rail billing must have a paid-in rate of at least 16.5 cents cwt. or the deficiency must be added to the proportional rate, which accrues to the eastern carrier. In the case of wheat flour moving from Chicago on the proportional rate of 81.5 cents cwt., a rail wheat bill must have a paid-in rate of 19 cents cwt. or the deficiency made up. Complainant's representative at the hearing was unaware of any instances where deficiencies had to be made up, stating that the shippers make sure that no such situation arises.

Appendix E is a statement showing the flat and reshipping rates and pads from Chicago to eastern trunkline destinations on barley, corn, grain sorghums, and oats, published by the Eastern Railroads for application from Chicago. The pad varies from 4.5 to 7.5 cents cwt. Complainant states that this was the first major departure from the long standing eastern domestic grain rate structure. Wheat was not included in the list of whole grains on which the rates apply, nor was wheat

flour included in the list of grain products. Wheat bran and shorts, by-products of the wheat milling process, are included in the list of animal and poultry feed ingredients on which these rates apply. The re-shipping rates (application thereof published in Item 655 of TPO Maurer's Tariff E-772-G I.C.C. C-945) from Chicago are applicable on traffic which reaches Chicago via rail or water. There is no pad requirement on water-arrived grain. As indicated, the pad on rail-arrived grain varies from 4.5 to 7.5 cents, below the present pads applicable at Chicago on wheat and wheat flour. Complainant has not shown the circumstances surrounding the publication of these rates. These rates, however, are limited with respect to routing and diversion and reconsignment privileges, and are subject to reduced free time, restricted transit privileges, limited liability and higher inspection charges, which limitations generally are not applicable to the rates on wheat and wheat products as set forth in the 245-I tariff hereinbefore referred to.

Appendix F hereto sets out the level of the flat rates and the re-shipping or proportional rates sought by complainant on wheat and wheat products from Chicago to the eastern basing points. The applicable Chicago-to-New York proportional rate of 81.5 cents cwt. (X-295-A level) on wheat is used as the key rate with the rates to other basing points made as a differential over or under, or a percentage of the Chicago-New York rate. The flat or local rates are made by adding 6.5 cents to the corresponding proportional rates. To restore the historic rate relationships complainant has made the rates on wheat products one-half cent higher than those on wheat (columns 5 and 6). However, to accomplish the publication of the flat rates as suggested by complainant, carriers would require relief from Section 4 of the Interstate Commerce Act. Complainant contends that this will present no problem to the carriers since similar relief from Section 4 was obtained by the Penn Central Railroad in connection with the application of one-factor rates via Kankakee, Ill. The record establishes, however, that the

Kankakee rates and the Section 4 relief granted resulted from water competition and the desire of the carriers to recapture rail traffic lost to that water carrier, circumstances which were not shown to be present in the instant case. In the alternative, complainant states that defendants could protect the Fourth Section by maintaining the Chicago rates to eastern points, probably up to the Ohio-Indiana State line. No evidence with respect thereto was submitted.

Water-arrived shipments of wheat and wheat products at Chicago enjoy identical status with rail-arrived shipments in the application of the re-shipping or proportional rates published from Chicago in TPO Maurer's Freight Tariffs C/TN 245-I I.C.C. C-375 and CTR 535, I.C.C. 4499, except as hereinbefore indicated, water-arrived traffic does not require a pad or minimum pay-in as in the case of inbound rail shipments. Complainant's second request for relief seeks to permit the application of the proportionals on motor carrier-arrived wheat and wheat products with the provision that the proportional rates applicable be those in effect on the dates such shipments leave Chicago. This provision is identical with the applicable inbound ex-lake traffic and permits the rail carriers to implement any increase in freight rates the day the increase becomes effective, rather than revert to the date at point of origin of inbound rail and barge traffic.

Complainant refers to an example where a proportional rate applies on motor carrier-arrived grain published in Item 3385-F Supplement 77, TPO Watson's NPCT Tariff 10-P I.C.C. 1158. These rates apply on barley or wheat from specified Washington and Idaho points to specified Oregon and Washington points, but do not allow transit inspections, diversion, or reconsignment, except that shipments may be recorded at destination for transit. These rates thus are not comparable to the assailed rates and are no support for the relief sought herein.

Appendix G hereto is a statement showing wheat receipts in bushels at Chicago for the years 1963 through 1972 via rail, motor carrier, and water carrier, and the percent of the total of each mode. However, the figures shown for the years 1971 and 1972 do not include certain receipts by Dixie-Portland Flour Mills, Inc. Using figures, in pounds, as submitted by this shipper's representative and as hereinafter set forth in Appendix H, and converting pounds to bushels at the rate of 60 pounds per bushel, the rail receipts as shown in Appendix G for the years 1971 and 1972 were, respectively, 7,469,000 and 7,362,000 and the truck receipts for 1971 and 1972 were, respectively, 15,995,000 and 15,673,000. For the years 1971 and 1972, columns 2, 4, 6 and 8 would have to be revised accordingly.

At the hearing held by the rail carriers certain parties appeared and opposed the proposed tariff changes suggested by complainant unless they were granted the same treatment.

Thus, the present flat rate from Chicago exceeds the flat rate from Indianapolis to New York, whereas the proposed 88 cent flat rate from Chicago would be less than the present 90.5 cent rate from Indianapolis. Other flat rates from points located east of Chicago to the Indiana-Ohio State line are higher than 88 cents.

The present proportional rate from Chicago to New York is 81.5 cents and complainant would retain that rate. This compares, however, with the present flat rates from the central part of Ohio, including Toledo, wherein the flat rate is also 81.5 cents. As to official territory, complainant's representative knew of no point where the proportional rail rate is available at the origin point on motor carrier-arrived traffic.

Generally the drawing area of the Chicago market for wheat is northern Illinois, northern Indiana, and western Indiana on the Milwaukee Railroad to Terre Haute, as well as the former Chicago and Eastern Illinois Railroad.

Complainant states that if it is successful here that there will be more traffic available to the Eastern Railroads. It is noted, however, that on March 10, 1960, the flat rate was reduced from 73.5 cents to 67 cents and on October 4, 1960, it was increased to 68 cents and remained at that figure for almost seven years, until August 19, 1967, when it was increased to 70 cents. However, as shown in Appendix G hereto, during the period 1963 through 1970 rail receipts showed a constant decline, except 1966 exceeded 1965 and 1967 exceeded 1966. In no year after 1963 did the rail receipts equal those in 1963.

Dixie-Portland Flour Mills, Inc., is engaged in the business of milling wheat into flour. Its flour mills are located at Chicago and other points not here involved; and it has an elevator in Chicago on the Calumet River which is capable of receiving and shipping wheat by barges and lake vessels. The flour mill at Chicago is landlocked and located on the Penn Central Transportation Company's line. Its milling capacity is 9,000 cwt. per day and the rated elevator storage capacity approximates 980,000 bushels. The Calumet elevator, which was acquired in March 1971, has a rated capacity of 4.8 million bushels and it is used to supply the Chicago flour mill with wheat and to store wheat for outside companies. To supply its Chicago flour mill with wheat from the Calumet elevator, Dixie-Portland must use either rail (85 percent) or motor truck (15 percent) in cross-town service, at additional expense. The Chicago mill's annual production is about 384,000,000 pounds, of which 288,000,000 pounds consist of flour and 96,000,000 pounds consist of mill feeds.

Inbound wheat to the Chicago mill arrives by railroad or motor carrier and to the Calumet elevator by rail, truck, and water carrier. This wheat originates at country origins in Illinois and Indiana and at such major terminals as the Twin Cities, Omaha-Council Bluffs, and Kansas City, as well as country stations west thereof. Of its flour production over 90 percent is distributed in the Chicago area (approximately 150

miles of Chicago) by a motor contract carrier; some flour moves three times a week to its flour distributing plant in Memphis; and the remainder moves throughout the territory east of the Illinois-Indiana State line. Insofar as the rate-break points of New York, Boston, Philadelphia, Norfolk and Cumberland are concerned, it ships only to New York and then only for sporadic periods. In Ohio, it ships only to Toledo, five truckloads of 45,000 pounds each, every week. In addition to wheat, it ships mill feeds outbound to various eastern points including points within 150 miles of Chicago to which a substantial amount moves, Ohio points, and considerable amounts to New England points (which take the Boston rate) for use by feed producers. The Toledo traffic moves by bulk truck and that to New England points moves by rail on both proportional rates and the non-transit mileage rates in the 772 tariff hereinbefore referred to.

Appendix H hereto sets forth inbound receipts of wheat at the Chicago mill and the Calumet elevator and the outbound shipments of wheat products consisting of flour and mill feeds. These outbound shipments move to the various destinations to which the shipper ships but the evidence does not show the amounts to specific geographical locations, other than as shown above with respect to those to which "substantial" or "considerable" amounts moved.

Of the approximate 1,500,000 bushels of soft wheat moved into Calumet storage yearly from Illinois and Indiana origins, in excess of 20 percent moves in by rail. Also about 250,000 bushels of hard wheat moves in by barge and about 750,000 bushels of spring wheat moves in (90 percent by rail and 2 percent by truck).

When the Chicago mill was acquired about ten years ago, it was for all practical purposes a 100-percent rail inbound and outbound operation. Because of numerous across-the-board increases in the gathering rates to Chicago, increases in the

outbound rates on products, and the rail carriers' inability to provide sufficient equipment and service, shipper sought other modes of transportation. When it took over the plant, it installed truck dump and bulk facilities at its flour mill and during the subsequent years the amount of truck traffic handled has increased.

Dixie-Portland's milling operation at Chicago is in competition with a General Mills' mill in Chicago and with storage facilities located in the Chicago area. Of the eight elevators in Chicago, five are located on water and they have about 80 percent of the total storage capacity. Dixie-Portland states that with respect to inbound movements of wheat its landlocked Chicago flour operation is at a distinct disadvantage with elevators located on water and that its inbound wheat movement is confined strictly to rail and motor carrier.

Elevators located on water can and do bring wheat in by barge or lake vessel in addition to rail and motor carrier; and the facilities located on water can cancel their truck billing against movements from Chicago via barge or lake vessels and utilize the inbound water or rail carrier billing for rail movements to the east in connection with proportional rates. This ability to switch the inbound billing according to the best possible advantage on outbound shipments is an advantage which a landlocked operation does not have, except in connection with inbound receipts by rail.

In view of the above, Dixie-Portland states that it would be desirable for all concerned to allow inbound motor carrier billing to be used in connection with outbound rail proportional rates; that the recognition of truck billing will simplify transit application and supervision; and that it will assist the mill to sell its products to rail-oriented customers in the east. It further states that Eastern Railroads would not suffer any loss in revenue if the flat rates are reduced to the extent requested by complainant because to its knowledge there are no movements

of wheat or wheat flour from Chicago on flat or local rates. It expects that the relief sought by complainant would result in additional wheat and wheat products traffic from Chicago to eastern destinations; but it presented no specific evidence as to where that alleged additional traffic would come from or how it would be handled by defendant rail carriers, considering that the latter appear unable to furnish all of the freight cars that the shipper desires at present. It believes that if the pad is reduced as sought to 6.5 cents cwt. it could operate thereunder by purchasing its truck wheat at harvest at 4 cents a bushel cheaper. However, during the last several years truck wheat and rail wheat have been selling at the same price and the record is not convincing that as of present if both truck wheat and rail wheat moving into Chicago could move out on rail proportional rates that truck wheat could be purchased at a lower price than rail wheat at country origins.

Continental Grain Company, of Chicago, Ill., operates two storage elevators at Chicago with a combined storage capacity in excess of 16,000,000 bushels. It engages in the buying and selling of grain, including wheat, but no wheat products. Its principal drawing market is from points in northern Indiana and northern Illinois within 150 miles of Chicago and most of such wheat is trucked into Chicago. During the year September 1, 1972 to August 31, 1973, Continental shipped 13,840,000 bushels of delivery grain from their two elevators in Chicago. In addition to this delivery function the company bought and sold many additional millions of bushels of grain that was put through the Chicago elevators. It does not show, however, the amount of this wheat which is included in the referred to figures.

Its representative at the hearing is a grain merchandiser for the company, a member of the Chicago Board of Trade Transportation and Grain Committees and a former member of the Board of Directors of the Board of Trade. He submitted considerable evidence with respect to the operations of the

futures and cash markets in the grain marketing system. He supports, on behalf of his company, the proposal to reduce the pad, as hereinbefore described, and to allow the proportional rates from Chicago to eastern points to be applicable to truck-originated traffic. He pointed out, as hereinbefore described, the advantages of having inbound wheat arriving at Chicago by rail with rail billing and the advantages of switch billing for the movement of outbound shipments of rail-arrived wheat and motor carrier-arrived wheat. He states that the effect of rate increases over the past years have made rail movement non-competitive against truck competition, especially on wheat. He admits, however, that much of the wheat moves by truck at the present, because of the lack of sufficient rail cars to perform such transportation. He expresses the view that the proposals of complainant will assist Continental and other companies in the Chicago area in obtaining wheat to move through the Chicago market to eastern points.

Generally, Continental's elevators are filled to capacity. Although it is stated that the proposal would result in additional wheat traffic for the Eastern Railroads no specific figures were submitted and otherwise such opinion is not supported by specific evidence. This traffic now is moving from other points, including such points as Toledo from which it is being transported by the Eastern Railroads and any diversion of wheat traffic to be moved through the Chicago market would be that now moving from other markets, by Eastern Railroads, and possibly other railroads.

It is pointed out that the Commodities Exchange Authority of the United States Department of Agriculture (which regulates and supervises the futures market) was instrumental in having the Chicago Board of Trade establish multiple delivery points on the wheat contract and starting with the July 19, 1973, contract, Toledo became a delivery point at 2 cents a bushel discount to the Chicago futures price. This was based on the difference in ocean or lake freight from Chicago to Toledo for

outbound water movements. No evidence was submitted, however, showing that this results in any unlawful discrimination or undue preference and prejudice within the provisions of the Interstate Commerce Act.

A cash grain merchant located at Chicago supports the proposals of the complainant, particularly the proposed application of the rail proportional rates to truck-arrived shipments. This witness solicits (a) consignments of grain from country origins and (b) offers of "to arrived" grain which he purchases and sells. In making sales of wheat to customers located east of the Illinois-Indiana State line he looks to the elevators in Chicago for stocks. Inbound billing is important to him in the movement of the wheat to the east because his customers are interested in rail transit billing, which enables them to utilize the proportional rate from Chicago to various eastern destinations. Thus, the flour mills located in the east which are customers of his depend on freight rates which permit transit arrangements. This allows the flour miller an opportunity to transit for subsequent movement of his products to destinations in the east. If the inbound movement of wheat into Chicago via motor carriers is given the same status now permitted on similar movements via rail or water in the application of the proportional rates from Chicago, this witness is of the view that it will put him in a position whereby he could increase his sales in the east because there would be more flexibility on the part of the elevator operators to offer him wheat without regard to whether the grain arrived by rail, water, or motor carrier.

As stated by the prior witnesses, most of the wheat is drawn from points in northern Illinois and northern Indiana within 150 miles of Chicago and moves in by truck. Witness states that the net returned to the farmer moving his wheat in by truck is reduced by reason of the pad. However, he admits, as have the other witnesses, that during the last several years there has been little or no differential between wheat shipped from the country origins by truck and that shipped by rail.

Nevertheless, he states that by reason of the pad, buyers at Toledo have an advantage over Chicago buyers, because of the unavailability of proportional rates on truck-arrived traffic at Chicago and the fact that the flat rate from Toledo is the same as the proportional rate from Chicago to New York. He further states that by reason thereof the mills and elevators east of Chicago, particularly in Toledo and environs, are able to reach into northeastern Indiana to points equi-distant between Chicago and Toledo, bid for wheat in competition with the Chicago buyers, and move their flour and wheat out from Toledo either by truck or on the 81.5 cents flat rail rate. The same situation is said to exist from numerous other points such as Columbus, Cincinnati, and Fostoria, Ohio, Hillsdale, Mich., and Ligonier, Ind.

This witness is almost entirely a rail operator, but does purchase some truck wheat in northern Indiana. He has experienced difficulty in purchasing rail-originated wheat and is of the view that if rail proportionals out of Chicago were made applicable to truck-arrived wheat, he would be more competitive with respect to the drawing of wheat from points equidistant from Toledo. Further, he is of the opinion that the relief sought would not result in any loss of traffic to the Eastern Railroads, and states that such relief would place the Eastern Railroads in a position to attract more rail traffic. He acknowledges, however, that the Eastern Railroads have had difficulty in furnishing a sufficient number of cars for eastbound traffic; that any alleged benefit from the proposal herein would be contingent upon the Eastern Railroads having additional equipment available; and that any such traffic as they might attract would be traffic which now moves from other markets.

No evidence was submitted by this witness showing the extent of his present operations and the extent to which there would be an increase in wheat handled by him if the relief sought is granted.

Defendants point out that the provision in Item 520 of the 245 tariff that the re-shipping or proportional rates apply only on traffic reaching the re-shipping point via rail or water applies not only to Chicago but to its competing points in Illinois and neighboring States. Thus, East St. Louis and Kankakee, Ill., St. Louis, Mo., and Milwaukee, Wis., among others, for example, are similarly subject to this restriction on the application of the proportional rate. The rates from Chicago are slightly lower in comparison to those applicable from other Illinois points. Various other origin points such as Milwaukee and Manitowoc, Wis., take the same flat and proportional rates as Chicago. Peoria and Decatur (from other than northwest origins), East St. Louis, and Cairo, Ill., St. Louis, Mo., as well as other Illinois points, have flat and proportional rates higher than Chicago. Appendix I hereto sets forth rates from Chicago and competitive points to New York. When traffic originates at a western territory point, such as Kansas City, Mo.-Kans. the combination rates to and from Chicago to eastern destinations is equalized over the other gateways (except that Peoria is one-half cent higher).

Appendix J shows the annual volume of wheat shipments from Chicago by various modes of transportation during the years 1962 through 1971; and according to 1971 Board of Trade statistics, wheat was shipped during that year via lake vessel, rail, and truck, in the following amounts:

Lake vessel	2,954,000 bushels (domestic and export)
Rail	3,462,000 bushels
Truck	26,000 bushels

Appendix K shows the volume of wheat and flour handled eastbound from Chicago by railroads during the six-year period 1958 through 1966 when the pad was 18.5 cents until March 1960 and thereafter from 12 to 13 cents, showing a decline in traffic handled every year, except in 1965 with respect to wheat and in 1960 and 1961 with respect to flour.

At the hearing Eastern Railroads contended that Chicago is not prejudiced by the present rate structure, pointing to the rates hereinafter set forth from other origins. They state that if the relief sought is granted it could not be limited to wheat and wheat products or to the movement of these commodities only from Chicago and its environs, but would require a realignment of the entire grain rate structure so as to include other grains and grain products and require reductions from other origins, the rates from which are related to the Chicago rates. Evidence was presented showing that when complainant sought from the railroads relief with respect to grain and grain products, similar to that sought herein various shippers stated that any adjustment made in the rates from Chicago to eastern destinations would require a related adjustment from origins east of Chicago and that in some instances shippers located west of Chicago also objected to any change in the rate relationship. Thus, at the hearing held by the railroads, General Foods appeared in favor, provided that their plant at Kankakee received a similar reduction with respect to corn and corn products. Also, Pillsbury appeared in support of the similar proposal concerning the application of the proportional rates to motor carrier-arrived grain and grain products but suggested that St. Louis and Minneapolis-St. Paul be accorded equal adjustment. The only shipper which supported the proposal without qualification concerning the addition or extension of the adjustment to other origins was Continental Grain Company. The Eastern Railroads also pointed out that it is doubtful that the reduction sought on wheat and wheat products would result in any additional traffic because a substantial amount of such traffic is now moving by eastern lines, as hereinbefore shown. The 26,000 bushels figure for truck wheat amounts to approximately 13 carloads; and the 1,340,000 bushels of lake vessel traffic which moves primarily to Buffalo would not, in the railroad's opinion, be divertable to their lines. Further, in 1971 a substantial portion of the wheat shipments and all of the flour shipments moved via rail. With respect to the facts concerning

Toledo and contentions with respect thereto, Eastern Railroads point out that if the proportional rates are made applicable on motor carrier-arrived wheat at Chicago the rails would then be required to charge the proportional rate of 81.5 cents to New York which is the same as the flat rate from Toledo, thus transporting the traffic the extra 233 miles (from Chicago to Toledo) for no additional charge. This, of course, deprives Toledo of its natural advantage of being 233 miles closer to the market.

Defendant The Baltimore & Ohio Railroad Company (B&O) submitted an estimate of the approximate amount of revenue reduction which it considers it would suffer if the Board of Trade is successful in obtaining the relief sought herein. B&O points out that complainant seeks a 10 cents reduction in the Chicago-New York flat rate, from 98 cents to 88 cents or approximately 10 percent. It concludes that, because of the relationship between the flat rate from Chicago and flat rates from St. Louis, Mo., points in Illinois, and points east of Illinois to eastern destinations, a 10 percent reduction in the rates on all wheat and wheat products traffic would ultimately be required and that this would result in $97,478 reduction in B&O revenue on this traffic. It further states that if complainant is successful in making the eastbound proportional rates applicable on truck-arrived traffic, other official territory origins will demand similar relief, resulting in additional revenue losses of $68,235, for a loss of $165,713. Set forth as Appendix L hereto are figures showing the pertinent traffic transported by The B&O during 1972 and the revenue therefrom, including a grand total revenue of $974,780.

B&O is of the opinion that its estimate of losses set forth above is conservative. In any event, it is of the view that even if the same reduction in cents or a comparable percentage reduction is not made with respect to all rates from origins east of Chicago that some adjustments would have to be made in

order to clear the requirements of section 4 of the Interstate Commerce Act. It bases this view on the opinion that the Commission would not allow fourth section relief.

Penn Central Transportation Company (Penn Central) submitted evidence similar to that submitted by the B&O. Based on traffic statistics and revenues received by it in 1972 in connection with the traffic involved in the instant proceeding, it concludes that if a 10 percent reduction in the Chicago-New York flat rate (from 98 cents to 88 cents) is granted Penn Central could suffer a 10 percent reduction ($1,037,380) in revenue, as shown in Appendix M hereto. It further states that if complainant is successful in having the Chicago-New York proportional rate made available on wheat trucked to Chicago, this would, for all practical purposes, make the Chicago-New York proportional rate the flat rate. And, all other official territory origin points would insist that their rate relationship with Chicago be maintained on all ex-truck traffic. It contends that if this were done it would result in approximately a 17 percent reduction in the rates from and to the above referred to points and Penn Central would experience an additional $726,273 reduction in its revenues, for a total revenue loss of $1,763,557. These revenue figures deal only with wheat and certain wheat products. However, if the Eastern Railroads were made to apply the sought reductions to other grains and grain products (as initially sought by complainant in proposals to the Eastern Railroads as hereinbefore referred to), the reduction in Penn Central's revenue would be much greater. Further, it points out that Fourth Section relief would be required; and it questions whether such relief would be granted by the Commission. It has made no estimate of the amount of revenue it would expect to lose if rates at intermediate points would be reduced to the level of the sought Chicago flat rate.

Appendix N hereto sets forth the tonnage of wheat and wheat products originated in 1972 at principal points in the

States named and the figures therein set forth are included in Appendix M. These statistics were submitted at the request of complainant.

Norfolk & Western Railway Company (N&W) submitted evidence similar to that submitted by the other two railroad defendants. Thus, as shown in Appendix O hereto, during 1972, N&W handled 6,261 cars of wheat and wheat products from points in the listed States to the referred to destination territory. These cars moved 227,434 tons producing $1,521,779 in revenue for N&W. The respective 10 percent loss and the loss from the 17 percent reductions referred to in connection with the prior railroads result in estimated losses of $255,490 and $178,844, for a total revenue loss of $434,334. Its contentions were similar to those of the B&O and Penn Central. As in the case of the other railroads, no calculations were made as to what the projected effect would be on the N&W if the Chicago flat rate were reduced to 88 cents and that was held at a minimum at intermediate points.

DISCUSSION AND CONCLUSIONS

Complainant and its witnesses contend that the total relief sought would make more traffic available to the Eastern Railroads and thus be beneficial to them. Suffice it to say that complainant's evidence is too indefinite and conjectural to support such a conclusion and, further, that defendants' evidence shows, at least, that reducing the flat rate would not result in additional revenue. In any event, the question to be resolved here is whether any of the complained of rates and tariff provisions violate sections 1, 2, and 3 of the Interstate Commerce Act, as alleged. The discussion hereafter will be divided into two parts, count (1), that relating to the alleged unlawfulness of the proportional and flat rates and the resulting

pads, and, count (2), that relating to the alleged unlawfulness of the tariff provision which precludes on the outbound movement from Chicago of motor carrier-arrived wheat the application of the proportional rates now applicable to rail-arrived and water-arrived wheat.

(1) In this count complainant alleges that the local and joint flat and proportional domestic rates and charges on wheat and wheat products from Chicago to various eastern basing points and other destinations in the east are unjust and unreasonable in violation of section 1 of the Act, unjustly discriminatory to wheat arriving at Chicago by rail from points beyond for further movement to the east in violation of section 2, and unduly prejudicial to Chicago, to complainant and its members, and to wheat and wheat products in violation of section 3(1) of the Act. It seeks to have the flat rates reduced so that the pad would be uniformly 6.5 cents. See Appendix F hereto.

Complainant points to the history of the flat and proportional rates as shown in Appendix B hereto and states that the evidence discloses no possible basis on which the present pads can be justified. The burden of proof, however, is upon complainant to show the unlawfulness of the rates resulting in the pads. Mere allegations of unlawfulness are not sufficient.

As indicated, in this count complainant asks only that the flat rate be reduced. It presented no cost evidence or other cost-related evidence showing that the flat rates are excessive and thus unreasonable. It refers to the mileage rates which are published in the CTR 772 series tariffs, I.C.C. C-945, which apply on barley, corn, grain sorghums, soybeans, and oats, pointing out that the pads with respect to the rates on these commodities range from 4.5 to 7.5 cents. See Appendix E. These latter rates deal with commodities different from those here in issue (being used principally for animal and poultry feeds) and are, as hereinbefore set forth, subject to various restrictions or limitations (to which the challenged rates are not

subject) which preclude their consideration in determining the reasonableness of the assailed flat rates. The fact that the flat rates are higher than the proportionals, in excess of 6.5 cents, does not without further proof establish that they are unreasonable. The progressive increases in flat rates and pads resulted from Ex Parte increases found by the Commission to be lawful.

The record establishes that no traffic moves from Chicago under the assailed flat rates, but the record does not establish that the flat rates have inhibited the movement of the involved traffic out of Chicago. Further, the record contains no convincing evidence that the sought reductions would result in movements thereunder. A statement by one of complainant's supporting witnesses that he probably could purchase truck-originated wheat at country origins at a sufficient discount to warrant the use of the flat rates is no more than conjecture and flies in the face of recent facts which show that due to the demands for wheat and the shortage of freight cars to haul it, truck-originated wheat has been selling at country origins at or near the prices of rail-originated wheat. The changes in the flat rates and pads sought by complainant are not to correct a transportation condition, but rather a market condition so as to enable its members to more readily buy and sell wheat and wheat products without being unduly inhibited by the Board of Trade rule which requires the seller to protect the pad on wheat and wheat products moving out of Chicago.

The Judge concludes that complainant has failed to show that the assailed rates and the resulting pads are unreasonable in violation of section 1 of the Act.

(b) Although under this count, complainant alleges violation of section 2, in its brief it sets forth no specific contentions concerning the alleged discrimination of the flat rates *per se* and resulting pads, relying instead on the justification therefor under its contentions relating to count 2.

Motor carrier-arrived wheat is not entitled to the proportional rates and, therefore, there is no pad which could differ from that applicable to rail-arrived wheat and thus resulting in discrimination to rail-arrived wheat. The flat rates are equally applicable to all wheat moving to, through, and from Chicago. Further, even if the proportionals are made applicable to motor-arrived wheat there would be no discrimination because they would be applicable to all common carrier-arrived wheat. At present, the pad is required in connection with rail-arrived wheat in order to avoid violations of section 4 of the Interstate Commerce Act. No such problem exists with respect to motor carrier-arrived wheat. Further, as hereinbefore set forth, the rates provided in Tariff E-772 on coarse grains, etc., used as feed ingredients, do not cover like traffic as that here involved and, as indicated above, are subject to differing restrictions and conditions so that they do not cover "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" as provided in section 2.

The Judge concludes that under this count complainant has failed to establish that the assailed rates and the resulting pads are discriminatory in violation of section 2 of the Act.

Whether the proportionals are discriminatory or unduly preferential because they are not applicable to motor carrier-arrived wheat will be discussed hereinafter under count 2.

(c) As in the case of allegations of section 2 violations discussed above, complainant in its brief does not under this count submit arguments as to alleged section 3(1) violations. The evidence does not establish that the assailed rates prejudice complainant (which ships no traffic) and its members, Chicago, or wheat and wheat products in violation of section 3(1), as alleged. Insofar as rates on wheat and wheat products from other shipping points are concerned, the evidence shows that the flat and proportional rates from those origins are the same

as or higher than the rates from Chicago, and also, that the pads applicable from those points on comparable rates are equal to or higher than the Chicago pads. See Appendix I hereto.

Toledo, also a competitor of Chicago, has available for shipments into the east a flat rate equal to the Chicago proportional, although Toledo is located 233 miles closer to eastern markets than is Chicago. Further, the Tariff E-772 rates afford no basis for a conclusion of preference and prejudice for the reasons hereinbefore set forth.

The Judge concludes that complainant has failed to establish any violation of the provisions of section 3(1) of the Act.

2. In this count, complainant alleges that the proportional rates on wheat and wheat products from Chicago to the east are unjust and unreasonable in violation of section 1 of the Act; unjustly discriminatory to motor-carrier-arrived wheat at Chicago and the shippers of such wheat and wheat products made therefrom, in violation of section 2; and unduly prejudicial to complainant and its members, to Chicago, and to motor-carrier-arrived wheat in Chicago in violation of section 3(1).

The Chicago proportional rates are restricted against application upon wheat which arrives at Chicago by motor carrier. They are, however, applicable on wheat which arrives at Chicago by rail or by water, and the products thereof. Wheat does arrive at Chicago by motor carrier and the volume of such motor-carrier-arrived wheat has been substantially increasing in recent years both as a result of disparities between the rail and the motor carrier rates and as a result of the inability of the rail carriers to furnish equipment to move wheat to the market.

Up to 1939, the proportional or reshipping rates from Chicago to the east applied equally on grain arriving at Chicago ex-rail, ex-lake, or ex-barge. Because of the vast increase in barge tonnage from competitive points subsequent to 1933, the

rail carriers proposed to restrict the proportional or reshipping rates against ex-barge traffic in order to recapture some of the traffic lost to the barges. The Commission originally held that this could be done, but indicated that in a proper proceeding it might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations. *Grain Proportionals, Ex-Barge to Official Territory,* 248 I.C.C. 307 (1941).

Subsequently, in a report on further hearing in *Grain Proportionals, Ex-Barge To Official Territory,* 262 I.C.C. 7, the Commission concluded, in part, that ex-barge grain rates east from Chicago would be reasonable and lawful even though they were 3 cents per hundred pounds higher than rates for ex-rail and ex-lake grain. Thus, in effect, the Commission permitted the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain.

The last cited decision was appealed to the Courts and ultimately resulted in the decision of the Supreme Court of the United States in *I.C.C. v. Mechling,* 330 U.S. 567 (1947). In that case, after referring to various provisions in part III of the Act, as well as section 3(4), the Supreme Court continued (pp. 576-577):

> Finally § 2 of the pre-existing Act has long forbidden the Commission to authorize railroads to charge one person more than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . ." [February 4, 1887] 24 Stat 379, 380, c 104, 49 USCA § 2, 10A FCA title 49, § 2.
>
> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. **Concretely, the provisions mean**

> **in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain.** (Emphasis added.)

The barge carriers involved in the *Mechling* case were certificated carriers under part III of the Act, but the grain traffic they handled was not necessarily subject to regulation and much of it in fact was not handled on regulated rates. Furthermore, as indicated, the eastern rail carriers had always permitted lake-arrived grain to move out on the Chicago proportional rates without penalty.

As a result of the decision in the *Mechling* case, the Eastern Railroads amended their tariffs to provide that the Chicago proportional rates would be applicable on grain which arrived at Chicago ex-barge.

The matter of restricting rail proportional rates against application on coal traffic having a subsequent movement by barge wholly on unregulated rates came before the Commission in *James McWilliams Blue Line v. Campbell's Creek R. Co.*, 278 I.C.C. 312 (1950). Again the Commission held that such a restriction was lawful. It stated at page 319:

> Complainant Blue Line cites *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, in which the Court permanently enjoined our order authorizing a 3-cent increase in certain ex-barge proportional rates on grain, without corresponding increases in certain proportional rates or specifics on ex-rail and ex-lake grain, the three sets of rates having been theretofore on a parity. The circumstances in that case are fully set forth in the Court's decision and in our report in *Grain Proportionals, Ex-Barge to Official Territory*, 262 I.C.C. 7. They differed in many essential respects from those presented here. **Most**

> **of the barge transportation of the grain was subject to our jurisdiction and it was impracticable to distinguish from a rate-making standpoint between that which was subject to our jurisdiction and that which was not. The lake transportation of the grain, like the coal transportation by water in the instant proceedings was not subject to our jurisdiction.** Increasing the ex-barge rates on grain without corresponding increases in the ex-lake rates on grain would have resulted in more favorable treatment of the unregulated lake transportation than of the regulated barge transportation. (Emphasis added.)

Suit was then filed by James McWilliams Blue Line in the United States District Court for the Southern District of New York to set aside and enjoin the Commission's order. The court granted the relief sought. In its opinion in *James McWilliams Blue Line v. United States,* 100 F. Supp. 66 (1951), it said, at page 70:

> . . . we hold that the rates complained of are unlawful because in violation of Section 2 of the Interstate Commerce Act, 49 U.S.C.A. § 2. We find it unnecessary, therefore, to determine the legality of these rates under Sections 3(1) and 3(4) of the Act.
>
> We are unable to distinguish the instant case from *I.C.C. v. Mechling,* 1946, 330 U.S. 567, 67 S.Ct. 894, 91 L.Ed. 1102. There the order of the Commission permitted the railroads to charge higher reshipment rates (3 cents per 100 lbs.) east from Chicago for grain brought to Chicago by barge than for ex-lake or ex-rail grain. The enforcement of the order was enjoined to the extent that it permitted this extra charge.
>
> . . . It has been settled with respect to the provisions of Section 2 of the Act prohibiting different charges by a common carrier for "a like and contemporaneous service in

the transportation of a like kind of traffic under substantially similar circumstances and conditions" that "***the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated."

* * *

Nor are we impressed by the attempt of the Commission to distinguish this case from the Mechling case because the Commission cannot regulate "Blue Line's" barge rates. That was true, at least as to part of the ex-barge grain in the Mechling case; however, as we read the Mechling case, the decision was not based upon the existence of jurisdiction in the Commission to regulate the barge rates on the grain traffic and was reached quite independently of such jurisdiction. (Emphasis added.)

In granting the relief sought, the court directed the Commission "to make and enter an appropriate order ending the practice complained of and enjoining the Commission from further continuing and enforcing the practices and rates now in effect". The court's judgment was affirmed *per curiam* by the Supreme Court. *Interstate Commerce Commission v. James McWilliams Blue Line, Inc.*, 342 U.S. 951 (1952). See also, *Chicago, Rock Island & Pacific R. Co. v. United States*, 233 F. Supp. 381, 386 (E.D. Mo., 1964).

The present situation cannot be distinguished from the *Blue Line* and *Mechling* cases. A large amount of wheat arrives at Chicago by motor carrier as well as by rail and water, but, whereas inbound billing on the ex-rail, ex-lake, and ex-barge wheat can be used to engage the Chicago proportional rates to the east, this is not true with respect to ex-truck billing. All wheat, whether ex-rail, ex-lake, ex-barge, or ex-truck goes into the same elevators. When it does so, it loses its identity insofar

as its mode of transportation is concerned. With respect to all wheat of the same type, there is no way to distinguish whether it arrived at the elevator by rail, water, or truck.

The issue here is not a matter of the physical transportation of the wheat and products but of the application of the inbound billing. When wheat comes out of the elevator or when wheat products are shipped from a mill, in most cases, neither the shipper nor the railroad knows how that particular wheat arrived at the elevator, nor does it make any difference to them. It makes no difference in the operation of the railroad whether the wheat arrived by rail, water, or truck.

Furthermore, switching billing is common and is permitted by the rail tariffs. In such a case, wheat which, because of its type, can be identified as having moved to the mill or elevator by truck, can be shipped out on the proportional rates and inbound rail or water billing can quite properly be applied so as to engage the proportional rates.

In any case, it makes no difference to the Eastern Railroads how the wheat arrived at the elevator or mill. Their service is exactly the same on the Chicago-to-the-east move whether the wheat arrived at the mill or elevator by rail, water or truck and thus the costs are the same.

Although no wheat or products thereof have moved on the flat rates to eastern points and shippers have, by various means moved their traffic out of Chicago, (including the shipment of motor-carrier-arrived wheat under rail proportional rates by switch-billing), they have shown that the complained of restriction has inhibited and damaged them in the conduct of their businesses of buying and selling wheat and wheat products and in the shipping thereof.

The Judge concludes that the Eastern Railroads' restriction against permitting the Chicago proportional rates to the east to apply on motor-carrier-arrived wheat at Chicago is an unjust

discrimination against such wheat and the shippers thereof in violation of section 2 of the Act, and that such restriction should be removed from the tariffs of the Eastern Railroads. In view of the above conclusion no further consideration will be given to the alleged violations of sections 1 and 3(1) of the Act.

The decision herein is not a major Federal Action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

FINDINGS AND ORDER

The Administrative Law Judge finds that the maintenance of the assailed proportional or reshipping rates and charges from Chicago, Ill., to points in the eastern United States, as set forth in the defendant railroads' tariffs, on wheat and wheat products, in carloads, where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge, without maintaining like rates and charges, at the same levels, and from and to the same points on the same commodities where the prior movement to Chicago is by for-hire motor carrier, is unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act; and that the assailed rates and charges are not shown to be otherwise unlawful.

The Judge further finds that this decision is not a major Federal Action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is the ORDER of the Administrative Law Judge that the defendant railroads be, and they are hereby, notified and required to cease and desist within 60 days of the date this order becomes effective and thereafter to abstain from the application of the rates and charges herein found unlawful; that the defendants be, and they are hereby notified and required to

establish within 60 days of the date this order becomes effective, upon not less than 30-days' notice to this Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act, and thereafter to maintain and apply, rates and charges removing the unlawful discrimination herein found to exist; and that this order shall continue in force until the further order of the Commission.

It is further ordered, That the complaint in all other respects be, and it is hereby, dismissed.

And it is further ordered, That in the absence of a stay or postponement by the Commission, or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof.

Dated at Washington, D.C. this 18th day of April, 1974.

By the Commission, (Alvin H. Schutrumpf), Administrative Law Judge.

ROBERT L. OSWALD,
Secretary.

(SEAL)

No. 35825

Appendix A

List of Defendants

Group I

Baltimore and Ohio Railroad Company, The.
Chesapeake and Ohio Railway Company, The,
Chesapeake District.
Chesapeake and Ohio Railway Company, The,
Pere Marquette District.
Chicago & Eastern Illinois Railroad Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago South Shore and South Bend Railroad.
Erie Lackawanna Railway Company, Thomas F. Patton and
Ralph S. Tyler, Jr., Trustees.
Grand Trunk Western Railroad Company.
Louisville and Nashville Railroad Company.
Norfolk and Western Railway Company.
Penn Central Transportation Company, George P. Baker,
Richard C. Bond, and Jervis Langdon, Jr., Trustees.

Group II

Akron, Canton & Youngstown Railroad Company, The.
Ann Arbor Railroad Company, The.
Arcade and Attica Railroad Corporation.
Aroostock Valley Railroad Company.
Baltimore and Annapolis Railroad Company, The.
Baltimore and Eastern Railroad Company.
Baltimore and Ohio Chicago Terminal Railroad
Company, The.
Bangor and Aroostock Railroad Company.
Bath and Hammondsport Railroad Company.

Belfast and Moosehead Lake Railroad Company.

Bellefonte Central Railroad Company.

Belt Railway Company of Chicago, The.

Bessemer and Lake Erie Railroad Company.

Boston and Maine Corporation, Robert W. Meserve, Trustee.

Boyne City Railroad Company.

Brooklyn Eastern District Terminal.

Burlington Northern Inc.

Cambria and Indiana Railroad Company.

Canadian National Railways Lines Thunder Bay, ON., Armstrong, ON., and East thereof.

Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Seaboard Coast Line Railroad Company; Louisville and Nashville Railroad Company.

Carolina and Northwestern Railway Company.

Central Indiana Railway Company.

Central Railroad Company of New Jersey, The, Robert D. Timpany, Trustee.

Central Vermont Railway, Inc.

Chesapeake Western Railway.

Chestnut Ridge Railway Company.

Chicago & Illinois Midland Railway Company.

Chicago and North Western Transportation Company.

Chicago River and Indiana Railroad Company, The.

Chicago, Rock Island and Pacific Railroad Company.

Cincinnati, New Orleans and Texas Pacific Railway Company, The.

Claremont and Concord Railway Company, Inc.

Clarendon and Pittsford Railroad Company, The.

Cooperstown and Charlotte Valley Railway Corporation.

Coudersport and Port Allegany Railroad Company.

CP Rail (Canadian Pacific Limited) Lines Thunder Bay, ON., and East thereof.

Dansville and Mount Morris Railroad Company, The.

Delaware and Hudson Railway Company.

Detroit and Mackinac Railway Company.
Detroit, Toledo and Ironton Railroad Company.
Detroit and Toledo Shore Line Railroad Company, The.
East Jersey Railroad and Terminal Company.
East Washington Railway Company.
Elgin, Joliet and Eastern Railway Company.
Fonda, Johnstown and Gloversville Railroad Company.
Fore River Railroad Corporation.
Frankfort & Cincinnati Railroad Company.
Genesee and Wyoming Railroad Company.
Georgia Rail Road & Banking Company, operated as the Georgia Railroad by

Lessees:
Louisville and Nashville Railroad Company
Seaboard Coast Line Railroad Company.

Grafton and Upton Railroad Company.
Grand Trunk Railway System
Green Mountain Railroad Corporation
Greenwich & Johnsonville Railway Company.
Hoboken Shore Railroad.
Pittsburgh and Lake Erie Railroad Company, The.
Pittsburgh & Shawmut Railroad Company, The.
Port Huron and Detroit Railroad Company.
Quebec Central Railway Company.
Rahway Valley Railroad (Rahway Valley Company, Lessee).
Raritan River Rail Road Company.
Reading Company, Richardson Dilworth and Andrew L. Lewis, Jr., Trustees.
Richmond, Fredericksburg and Potomac Railroad Company.
Rosslyn Connecting Railroad Company.
St. Johnsbury & Lamoille County Railroad.
St. Louis Southwestern Railway Company.
Seaboard Coast Line Railroad Company.
Seaport Navigation Company.
Skaneateles Short Line Railroad Corporation.
Soo Line Railroad Company.

South Brooklyn Railway Company.
Southern Railway Company.
Springfield Terminal Railway Company (Vermont).
Staten Island Railroad Corporation, The.
Stewartstown Railroad Company, The.
Terminal Railroad Association of St. Louis.
Toledo, Peoria & Western Railroad Company.
Toronto, Hamilton and Buffalo Railway Company, The.
Trenton-Princeton Traction Company. (RDG)
Twin Branch Railroad Company.
Vermont Railway, Inc.
Virginia Central Railway.
Warwick Railway Company.
Wellsville, Addison & Galeton Railroad Corporation.
Western Maryland Railway Company.
West Virginia Northern Railroad Company.
Wharton and Northern Railroad Company.
Winchester and Western Railroad Company.
Winfield Railroad Company, The.
Yancey Railroad Company.
Youngstown & Southern Railway Company.
Illinois Central Gulf Railroad Company.
Illinois Northern Railway.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.
Ironton Railroad Company, The (Lehigh Valley Railroad Company and Reading Company, Lessees).
Lackawanna & Wyoming Valley Railway Company.
Lake Erie, Franklin & Clarion Railroad Company.
Lehigh and Hudson River Railway Company, The, John Trioano, Trustee.
Lehigh and New England Railway Company.
Lehigh Valley Railroad Company, John F. Nash and Robert C. Haldeman, Trustees.
Livonia, Avon & Lakeville Railroad Corporation.
Long Island Rail Road Company, The.

Lorain & West Virginia Railway Company, The.
Louisville and Nashville Railroad Company.
Louisville, New Albany & Corydon Railroad Company.
Lowville and Beaver River Railroad Company, The.
Maine Central Railroad Company.
Manufacturers Railway Company.
Maryland and Pennsylvania Railroad Company.
Middletown and New Jersey Railway Company, Inc.
Midway Railroad Company.
Missouri-Illinois Railroad Company.
Missouri-Pacific Railroad Company.
Montour Railroad Company.
Montpelier and Barre Railroad Company.
Morristown & Erie Railroad Company.
Moshassuck Valley Railroad Company.
Narragansett Pier Railroad Company, Inc., The.
New Jersey, Indiana & Illinois Railroad Company.
New York Dock Railway.
New York and Long Branch Railroad Company, The.
New York, Susquehanna and Western Railroad Company.
Norfolk, Franklin and Danville Railway Company.
Norfolk Southern Railway Company.
Northampton and Bath Railroad Company.
Norwood & St. Lawrence Railroad Company.
Ogdensburgh Bridge and Port Authority.
Paducah & Illinois Railroad Company.
Pennsylvania and Atlantic Railroad Company (The Union Transportation Company, Lessee).
Pennsylvania-Reading Seashore Lines.
Peoria and Pekin Union Railway Company.
Peoria Terminal Company.

No. 35825

Appendix B

Statement of Flat and Proportional Rates from Chicago, Ill., to New York (Domestic) with Applicable "Pad" from March 1938, to Date (X-295-A)

Date	Wheat			Wheat Products			
	Flat	Prop	Pad	Flat	Prop	Pad	Rate Level
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Mar. 28, 1938	34.5	26	8.5	35	26.5	8.5	X-123, ICC 30
Jan. 21, 1947	40	30	10	40.5	30.5	10	X-162, ICC 771
Jan. 8, 1948	50	37.5	12.5	50.5	38	12.5	X-166, ICC 784
Sept. 26, 1949	55.5	41.5	14	56	42	14	X-168, ICC 811
Apr. 5, 1956	62	46.5	15.5	62.5	47	15.5	X-175, ICC A-1076
Jul. 10, 1956	65.5	49	16.5	66	49.5	16.5	X-196, ICC A-1095
May 10, 1957	69	51.5	17.5	69.5	52	17.5	X-206, ICC A-1122
Oct. 18, 1957	71.5	53.5	18	72	54	18	X-206-A, ICC A-113
Jun. 1, 1958	73.5	55	18.5	74	55.5	18.5	X-212, ICC A-1113
Mar. 10, 1960	67	55	12	67.5	55.5	12	X-212
Oct. 24, 1960	68	55.5	12.5	68.5	56	12.5	X-223, ICC 151
Aug. 19, 1967	70	57.5	12.5	70.5	58	12.5	X-256, ICC 281
Nov. 28, 1968	74	61	13	75	61	14	X-259-B, ICC 302
Nov. 18, 1969	78	65	13	80	65	15	X-262, ICC 312
Nov. 20, 1970	83	69	14	85	69	16	X-265-B, ICC 336
Apr. 12, 1971	92	76.5	15.5	94.5	76.5	18	X-267-B, ICC 343
Oct. 23, 1972	95	79	16	97.5	79	18.5	X-281-B, ICC 380
Aug. 19, 1973	98	81.5	16.5	100.5	81.5	19	X-295-A, ICC 397

Tariff Authority:

March 28, 1938	C.F.A. Tariff 245-F, ICC 3055—5% Table Inc.
January 21, 1947	C.F.A. Tariff 245-G, ICC 3356—15% Table Inc.
June 8, 1948	C.F.A. Tariff 245-G, ICC 3356—25% Table Inc.
Sept. 26, 1949	C.T.R. Tariff 245-H, ICC 4403—10% Table Inc.
April 5, 1956	C.T.R. Tariff 245-H, ICC 4403—12% Table Inc.

July 10, 1956	C.T.R. Tariff 245-H, ICC 4403—5% Table Inc.
May 10, 1956	C.T.R. Tariff 245-H, ICC 4403—5% Table Inc.
October 18, 1957	C.T.R. Tariff 245-H. ICC 4403—9% Table Inc.
June 1, 1958	C.T.R. Tariff 245-H, ICC 4403—3% Table Inc.
March 10, 1960	C.T.R. Tariff 245-H, ICC 4403—Sup. 150 (Reduction in Flat Rates)
October 24, 1960	C.T.R. Tariff 245-H, ICC 4403—.5 cent Inc.*
August 19, 1967	TL/CTR Tariff 245-I, ICC C-375—2 cents Inc.
November 28, 1968	TL/CTR Tariff 245-I, ICC C-375—6% Table Inc.
November 18, 1969	TL/CTR Tariff 245-I, ICC C-375—6% Table Inc.
November 20, 1970	TL/CTR Tariff 245-I, ICC C-375—6% Table Inc.
April 12, 1971	TL/CTR Tariff 245-I, ICC C-375—11%-G Table Inc.
October 23, 1972	TL/CTR Tariff 245-I, ICC C-375—3%-G Table Inc.
August 19, 1973	TL/CTR Tariff 245-I, ICC C-375—3%-G Table Inc.

---

* .5 cent Increase in rates less than 65¢ cwt. and 1 cent Increase in rates over 65¢ cwt.

Appendix C

Statement Showing Flat and Proportional Rates and Corresponding Pads on Wheat from Chicago, Ill., to Eastern Trunk Line Basing Points from March 10, 1960, to August 19, 1973 (In Cents Per 100 Pounds)

To		Ex-Parte Increase Rate Level								
		295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
New York, N.Y.	a	98	95	92	83	78	74	70	68	67
	b	81.5	79	76.5	69	65	61	57.5	55.5	55
	c	16.5	16	15.5	14	13	13	12.5	12.5	12
Albany, N.Y.	a	95.5	92.5	90	80	76	72	68	66	65
	b	79	76.5	74.5	66	63	59	55.5	53.5	53
	c	16.5	16	15.5	14	13	13	12.5	12.5	12
Baltimore, Md.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Belington, W. Va.	a	86	83.5	81	72	69	65	61	59	58
	b	67.5	65.5	63.5	57	54	51	48.5	46.5	46
	c	18.5	18	17.5	15	15	14	12.5	12.5	12
Boston, Mass.	a	101.5	98.5	95.5	85	81	76	72	70	69
	b	84	81.5	79	70	67	63	59.5	57.5	57
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Cumberland, Md.	a	86	83.5	81	72	69	65	61	59	58
	b	67.5	65.5	63.5	57	54	51	48.5	46.5	46
	c	18.5	18	17.5	15	15	14	12.5	12.5	12
Hagerstown, Md.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Newport News, Va.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Norfolk, Va.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Philadelphia, Pa.	a	95.5	92.5	90	80	76	72	68	66	65
	b	79	76.5	74.5	66	63	59	55.5	53.5	53
	c	16.5	16	15.5	14	13	13	12.5	12.5	12

To		Ex-Parte Increase Rate Level								
		295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Rochester, N.Y.	a	88.5	86	83.5	75	71	67	63	61	60
	b	70.5	68.5	66.5	60	57	54	50.5	48.5	48
	c	18	17.5	17	15	14	13	12.5	12.5	12
Rockland, Me.	a	101.5	98.5	95.5	85	81	76	72	70	69
	b	84	81.5	79	70	67	63	59.5	57.5	57
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Strasburg, Va.	a	94	91.5	89	79	75	71	67	65	64
	b	76	74	72	64	61	58	54.5	52.5	52
	c	18	17.5	17	15	14	13	12.5	12.5	12
Syracuse, N.Y.	a	88.5	86	83.5	75	71	67	63	61	60
	b	70.5	68.5	66.5	60	57	54	50.5	48.5	48
	c	18	17.5	17	15	14	13	12.5	12.5	12
Utica, N.Y.	a	89.5	87	84.5	76	72	68	64.5	62.5	61.5
	b	71.5	69.5	67.5	61	58	55	52	50	49.5
	c	18	17.5	17	15	14	13	12.5	12.5	12

a—Flat Rate

b—Proportional Rate

c—Pad

Tariff Authority: TPO B.B. Maurer, C/TN-245-I, ICC C-375

X-295-A —Eff. 8/19/73
X-281-B —Eff. 10/23/72
X-267-B —Eff. 4/28/73 (Increase Table—Supp. 307, C/TN 245-I, ICC C-375)
X-265-B —Eff. 11/20/70
X-262 —Eff. 11/18/69
X-259-B —Eff. 11/28/68
X-256 —Eff. 8/19/67
X-223 —Eff. 7/1/63 (New Tariff Issue, TPO: H.R. Hinsch C/TN 245-I, ICC C-375)
X-212 —Eff. 3/10/60 (Reduction In Flat Rate From Chicago), TPO: H.R. Hinsch, Freight Tariff 245-H, ICC 4403, Supp. 193.

No. 35825

Appendix D

Statement Showing Flat and Proportional Rates and Corresponding Pads on Wheat Products from Chicago, Illinois to Eastern Trunk Line Basing Points from March 10, 1960 to August 19, 1973

(In Cents Per 100 Pounds)

		Ex Parte Increase Rate Level								
To		295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
New York, N.Y.	a	100.5	97.5	94.5	85	80	75	70.5	68.5	67.5
	b	81.5	79	76.5	69	65	61	58	56	55.5
	c	19	18.5	18	16	15	14	12.5	12.5	12
Albany, N.Y.	a	96.5	93.5	91	82	77	73	68.5	66.5	65.5
	b	79	76.5	74.5	67	63	59	56	54	53.5
	c	17.5	17	16.5	15	14	14	12.5	12.5	12
Baltimore, Md.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Belington, W.Va.	a	86	83.5	81	73	69	65	61.5	59.5	58.5
	b	68.5	66.5	64.5	58	55	52	49	47	46.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Boston, Mass.	a	102.5	99.5	96.5	87	82	77	72.5	70.5	69.5
	b	85	82.5	80	72	68	64	60	58	57.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Cumberland, Md.	a	86	83.5	81	73	69	65	61.5	59.5	58.5
	b	68.5	66.5	64.5	58	55	52	49	47	46.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Hagerstown, Md.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Newport News, Va.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12

To		Ex Parte Increase Rate Level								
		295-A	281-B	267-B	265-B	262	259-B	256	223	212
(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Norfolk, Va.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Philadelphia, Pa.	a	96.5	93.5	91	82	77	73	68.5	66.5	65.5
	b	79	76.5	74.5	67	63	59	56	54	53.5
	c	17.5	17	16.5	15	14	14	12.5	12.5	12
Rochester, N.Y.	a	88.5	86	83.5	75	71	67	63.5	61.5	60.5
	b	70.5	68.5	66.5	60	57	54	51	49	48.5
	c	18	17.5	17	15	14	13	12.5	12.5	12
Rockland, Me.	a	102.5	99.5	96.5	87	82	77	72.5	70.5	69.5
	b	85	82.5	80	72	68	64	60	58	57.5
	c	17.5	17	16.5	15	14	13	12.5	12.5	12
Strasburg, Va.	a	95.5	92.5	90	81	76	72	67.5	65.5	64.5
	b	76	74	72	65	61	58	55	53	52.5
	c	19.5	18.5	18	16	15	14	12.5	12.5	12
Syracuse, N.Y.	a	88.5	86	83.5	75	71	67	63.5	61.5	60.5
	b	70.5	68.5	66.5	60	57	54	51	49	48.5
	c	18	17.5	17	15	14	13	12.5	12.5	12
Utica, N.Y.	a	90.5	88	85.5	77	73	69	65	63	62
	b	74	72	70	63	59	56	52.5	50.5	50
	c	16.5	16	15.5	14	14	13	12.5	12.5	12

a—Flat Rate

b—Proportional Rate

c—Pad

Tariff Authority: TPO B.B. MAURER, C/TN 245-I, I.C.C. C-375

X-295-A —Eff. 8/19/73

X-281-B —Eff. 10/23/72

X-267-B —Eff. 4/28/73 (Increase Table—Supp. 307, C/TN 245-I, I.C.C. 375)

X-265-B —Eff. 11/20/70

X-262 —Eff. 11/18/69

X-259-B —Eff. 11/28/68

X-256 —Eff. 8/19/67

X-223 —Eff. 7/1/63 (New Tariff Issue, C/TN 245-I, I.C.C. C-375) TPO: H. R. Hinsch

X-212 —Eff. 3/10/60 (Reduction in Flat Rate From Chicago), TPO: H. R. Hinsch, Freight Tariff 245-H, I.C.C. 4403, Supp. 193

Appendix E

Statement Showing Flat and Reshipping Rates also "Pads" from Chicago to Eastern Trunk Line Destinations on Barley, Corn, Grain Sorghums and Oats (In Cents Per 100 Pounds)

(1)	(Eff. 8-19-73) X-295-A			(Eff. 10-23-72) X-281-B			(Eff. 4-12-71) X-267-B		
	(2) Flat	(3) Res.	(4) Pad	(5) Flat	(6) Res.	(7) Pad	(8) Flat	(9) Res.	(10) Pad
Albany, N. Y.	66	61	5.0	64	59	5.0	62	57.5	4.5
Baltimore, MD.	65	59.5	5.5	63	58	5.0	61	56.5	4.5
Belington, W. Va.	53	48.5	4.5	51.5	47	4.5	50	45.5	4.5
Boston, Mass.	79	71.5	7.5	76.5	69.5	7.0	74.5	67.5	7.0
Cumberland, MD.	54	48.5	5.5	52.5	47	5.5	51	45.5	5.5
Hagerstown, MD.	59.5	53	6.5	58	51.5	6.5	56.5	50	6.5
New York, N. Y.	74	67.5	6.5	72	65.5	6.5	70	63.5	6.5
Newport News, Va.	74	67.5	6.5	72	65.5	6.5	70	63.5	6.5
Norfolk, Va.	74	67.5	6.5	72	65.5	6.5	70	63.5	6.5
Philadelphia, Pa.	68.5	64	4.5	66.5	62	4.5	64.5	60	4.5
Rochester, N. Y.	53	48.5	4.5	51.5	47	4.5	50	45.5	4.5
Rockland, Me.	86	80.5	5.5	83.5	78	5.5	81	75.5	5.5
Strasburg, Va.	63	56.5	6.5	61	55	6.0	59	53.5	5.5
Syracuse, N. Y.	58.5	53	5.5	57	51.5	5.5	55.5	50	5.5
Utica, N. Y.	61	54	7.0	59	52.5	6.5	57.5	51	6.5

Tariff Authority: TPO Maurer's TL/CTR E-1009-A, ICC C-391; TL/CTR E-772-G, ICC C-945

No. 35825

Appendix F

Statement Showing Proposed Wheat and Wheat Products Rates from Chicago to Eastern Basing Points Reflecting the 6.5¢ cwt. "PAD"

(Cents Per 100 Pounds—X-295-A Level)

	Wheat			Wheat Products		
To	Flat	Prop	Pad	Flat	Prop	Pad
(1)	(2)	(3)	(4)	(5)	(6)	(7)
New York, N.Y.	88	81.5	6.5	88.5	82	6.5
Albany, N.Y.	84.5	78	6.5	85	78.5	6.5
Baltimore, Md.	85	78.5	6.5	85.5	79	6.5
Belington, W. Va.	75	68.5	6.5	75.5	69	6.5
Boston, Ma.	90	83.5	6.5	90.5	84	6.5
Cumberland, Md.	75	68.5	6.5	75.5	69	6.5
Hagerstown, Md.	85	78.5	6.5	85.5	79	6.5
Newport News, Va.	85	78.5	6.5	85.5	79	6.5
Norfolk, Va.	85	78.5	6.5	85.5	79	6.5
Philadelphia, Pa.	86	79.5	6.5	86.5	80	6.5
Rochester, N.Y.	77.5	71	6.5	78	71.5	6.5
Rockland, Me.	90	83.5	6.5	90.5	84	6.5
Strasburg, Va.	85	78.5	6.5	85.5	79	6.5
Syracuse, N.Y.	77.5	71	6.5	78	71.5	6.5
Utica, N.Y.	80	73.5	6.5	80.5	74	6.5

No. 35825

Appendix G

Statement Showing Wheat Receipts in Bushels at Chicago For a Series of Years Via Rail, Motor Carrier and Water, also Percent of Total Via Each Mode (000 Bushels Omitted)

Year	Total Wheat Receipts	Rail Receipts	% of Total	Truck Receipts	% of Total	Barge-Lake Receipts	% of Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1972	17024	3780	22.2	11655	68.5	1589	9.3
1971	18502	3746	20.2	10015	54.1	4741	25.6
1970	20610	5049	24.5	6013	29.2	9548	46.3
1969	20241	5697	28.1	8934	44.1	5610	27.7
1968	26025	7628	29.3	10270	39.5	8127	31.2
1967	35156	11358	32.3	12677	36.1	11121	31.6
1966	25986	9677	37.2	7847	30.2	8462	32.6
1965	30247	8639	28.6	7255	24.0	14353	47.5
1964	33581	10864	32.4	9297	27.7	13420	40.0
1963	33481	11928	35.6	10451	31.2	11102	33.2

Source: Annual Statistics Chicago Board of Trade.

No. 35825

Appendix H

Statement of Inbound Receipts of Wheat at Dixie Portland Flour Mill, and Outbound Shipments of Products Via Rail and Motor Carrier

(In Pounds 000 Omitted)

	Rail		Truck		Rail*
	Wheat Receipts	Products Shipments	Wheat Receipts	Products Shipments	Non-Transit Shipments
1969	272,484	187,642	144,384	246,390	
1970	243,289	154,388	108,401	222,091	
1971	163,428	136,188	353,412	273,953	50,777
1972	214,943	100,847	241,109	309,330	42,048
1973	46,070	50,931	132,720	152,717	10,397
Jan.-June					

* Rail Shipment of Millfeeds Under Non Transit Mileage Rates In

TPO: Maurer's TL/CTR-E-772-G, ICC C-945.

No. 35825

Appendix I

Statement of Flat and Proportional Rates from Chicago and Competitive Points to New York (Domestic) together with Applicable Pad Rates in Cents Per 100 Lbs. (Ex Parte 295-A Level)

Origin	Wheat			Wheat Products		
	Flat Rate	Proportional Rate	Pad	Flat Rate	Proportional Rate	Pad
Chicago, Ill.	98	81½	16½	100½	81½	19
Manitowac, Wis.	98	81½	16½	100½	81½	19
Milwaukee, Wis.	98	81½	16½	100½	81½	19
Peoria-Pekin, Ill.	(a) 119	(c) 86	33	(a) 119	(c) 86	33
	(b) 103½	(c) 86	17½	(b) 103½	(c) 86	17½
Decatur, Ill.	(a) 119	(c) 86	33	(a) 119	(c) 86	33
	(b) 103½	(c) 86	17½	(b) 103½	(c) 86	17½
Springfield, Ill.	(a) 119	(c) 86	33	(a) 119	(c) 86	33
	(b) 103½	(c) 86	17½	(b) 103½	(c) 86	17½
East St. Louis Ill. St. Louis, Mo.	(a) 119	90½	28½	(a) 120	90½	29½
	(b) 103½	90½	13	(b) 103½	90½	13
Quincy, Ill.	(a) 127	90½	36½	(a) 128	90½	37½
	(b) 112	90½	21½	(b) 112	90½	21½

(a) Flat rate subject to comparable conditions as applicable to Chicago flat rate.

(b) Flat rate subject to no more than two transit privileges and non-application of Rule 24 of the Classification (freight in excess of full carload rule).

(c) Proportional rate except on traffic originating in Northwest Territory. The applicable proportional rate on traffic originating in Northwest Territory is the same as from Chicago, Ill. viz: 81½.

Tariff Reference: TL-CTR TB 245-I, ICC C-375

No. 35825

Appendix J

Annual from Chicago Shipments of Wheat (Bushels)

(000 Omitted)

Year	Lake Vessel To				Via			
	US Ports	Canadian Ports	Overseas Ports	Total	Barge	Rail	Truck	Total
1962.....	5,272	—	130	5,402	1,145	9,275	22	15,844
1963.....	4,698	2,604	599	7,901	3,114	9,982	29	21,026
1964.....	7,708	1,377	—	9,085	5,719	10,315	9	25,129
1965.....	10,315	3,878	168	14,361	423	7,151	1	21,936
1966.....	4,743	1,185	—	5,928	240	8,494	26	14,688
1967.....	8,404	189	88	8,681	2,109	5,300	103	16,193
1968.....	5,798	212	58	6,068	4,574	10,089	153	20,884
1969.....	2,317	661	—	2,978	1,838	7,456	47	12,319
1970.....	2,826	999	991	4,816	—	6,742	31	11,589
1971.....	1,340	550	1,064	2,954	—	3,462	26	6,442

SOURCE: Annual Statistics Chicago Board of Trade

No. 35825

Annual Chicago Shipments of Flour (Sacks)

(000 Omitted)

Year	VIA Lake Vessel	Barge	Rail	Truck	Total
1962	750	—	6,258	—	7,008
1963	—	—	6,733	—	6,733
1964	—	—	6,515	—	6,515
1965	—	—	5,584	—	5,584
1966	—	—	5,857	—	5,857
1967	—	—	4,530	—	4,530
1968	—	—	4,341	—	4,341
1969	—	—	6,972	—	6,972
1970	—	—	6,912	—	6,912
1971	—	—	5,454	—	5,454

SOURCE: Annual Statistics Chicago Board of Trade

No. 35825

Appendix K

Chicago-East Bound Rail Shipments of Wheat and Flour—(1958-1966)

(000 Omitted)

Year	Wheat (Bushel)	Flour (Sacks)
1958	9,293	2,842
1959	7,552	1,739
1960	6,199	1,804
1961	4,864	1,804
1962	3,468	1,374
1963	1,529	1,203
1964	679	954
1965	2,353	771
1966	133	841

SOURCE: Annual Statistics Chicago Board of Trade, 1966.

No. 35825

Appendix L

Shipments of Wheat, Bran, Middlings, and Wheat Flour Handled by B&O in 1972 from Origin Points in Illinois, (including St. Louis, Mo.), Indiana, Michigan (lower peninsula) and Ohio, including the Buffalo, N. Y. area, and Destined to Buffalo, New York, Pittsburgh, Pa., and Official Territory Points East Thereof. An attempt was made to exclude export traffic.

WHEAT—STCC NO. 01-137-10

From	Cars	Tons	B&O Revenue
Illinois (including St. Louis, Mo.)	11	720	$ 11,396
Indiana	10	495	3,877
Michigan (lower peninsula)	—	—	—
Ohio	360	29,563	238,090
Buffalo, N.Y. Area	—	—	—
Total	381	30,778	$253,363

WHEAT FLOUR—STCC NO. 20-411-10

Illinois (including St. Louis, Mo.)	251	9,763	$ 62,561
Indiana	202	5,968	44,898
Michigan (lower peninsula)	98	3,003	24,358
Ohio	783	45,036	184,529
Buffalo, N.Y. Area	805	26,176	192,750
Total	2,139	89,946	$509,096

MIDDLINGS—STCC NO. 20-412-10

Illinois (including St. Louis, Mo.)	47	1,789	$13,178
Indiana	3	193	1,168
Michigan (lower peninsula)	16	637	6,922
Ohio	464	17,947	37,190
Buffalo, N.Y. Area	71	2,887	13,957
Total	601	23,453	$72,415

BRAN-STCC NO. 20-412-20

From	Cars	Tons	B&O Revenue
Illinois (including St. Louis, Mo.)	20	652	$ 6,637
Indiana	—	—	—
Michigan (lower peninsula)	2	70	610
Ohio	327	9,349	11,397
Buffalo, N.Y. Area	68	2,041	9,887
Total	417	12,112	$28,531

GRAIN FLOUR, NEC—STCC NO. 20-419-92

Illinois (including St. Louis, Mo.)	—	—	$ —
Indiana	10	257	2,041
Michigan (lower peninsula)	5	144	922
Ohio	109	6,795	-3,306
Buffalo, N.Y. Area	—	—	—
Total	124	7,196	$ -343

FLOUR EDIBLE, NEC—STCC NO. 20-452-90

Illinois (including St. Louis, Mo.)	225	8,830	$ 72,205
Indiana	5	129	1,746
Michigan (lower peninsula)	10	338	3,761
Ohio	119	4,824	23,302
Buffalo, N.Y. Area	51	1,416	10,704
Total	410	15,537	$111,718

TOTAL WHEAT AND WHEAT PRODUCTS—YEAR 1972

Illinois (including St. Louis, Mo.)	554	21,754	$165,977
Indiana	230	7,042	53,730
Michigan (lower peninsula)	131	4,192	36,573
Ohio	2,162	113,514	491,202
Buffalo, N.Y. Area	995	32,520	227,298
GRAND TOTALS	4,072	179,022	$974,780

No. 35825

Appendix M

Breakdown of Tonnage and Revenue Figures Contained In Verified Statement of T. E. Sellinger (Exhibit 11)— By State of Origin and Commodity (Penn Central-1972)

Origins	Commodity	Cars[1]	Tons	Revenue
Illinois	Wheat (01-137-10)	69	4,284	48,917
(Includes St. Louis, Mo.)	Wheat Flour (20-411-10)	2,549	104,354	1,276,934
	Semolina & Flour Mixture (20-411-15)	9	328	6,131
	Wheat Middlings or Shorts (20-412-10)	218	8,885	77,716
	Wheat Bran & 2½% other ingredients (20-412-15)	30	825	6,182
	Wheat Bran (20-412-20)	39	1,125	11,028

[1] All shipments of wheat to Albany, Baltimore, and Norfolk were eliminated so as to exclude export traffic. Some domestic traffic could have been also eliminated. The same procedure was not followed in connection with the figures on flour because New York City receives a great deal of domestic flour. However, apparently there are no flour mills in Philadelphia, Baltimore, and Norfolk.

Origins	Commodity	Cars	Tons	Revenue
	Compound Flour, Grain with other ingredients not exceeding 40% (20-452-30)	65	2,021	27,383
	Flour, edible NEC (20-452-90)	915	27,923	391,193
	TOTALS	3,894	149,745	1,845,538
Indiana	Wheat (01-137-10)	106	11,103	138,919
	Wheat Flour (20-411-10)	1,354	46,543	285,363
	Semolina & Flour Mixture (20-411-15)	1	27	49
	Semolina (20-411-25)	1	42	393
	Wheat Middlings or Shorts (20-412-10)	107	4,521	28,338
	Wheat Bran (20-412-20)	4	128	1,400
	Flour, edible NEC (20-452-90)	234	6,763	41,158
	TOTALS	1,807	69,127	495,619
Michigan (Lower Peninsula)	Wheat (01-137-10)	22	1,317	10,835
	Wheat Flour (20-411-10)	1,811	69,911	440,285

Origins	Commodity	Cars	Tons	Revenue
	Wheat Middlings or Shorts (20-412-10)	887	42,404	155,583
	Wheat Bran (20-412-20)	289	7,683	31,786
	Compound, Flour, grain with other ingredients not exceeding 40% (20-452-30)	644	20,142	157,264
	Flour, edible NEC (20-452-90)	75	3,093	23,785
	TOTALS	3,728	144,550	819,538
Ohio	Wheat (01-137-10)	1,414	109,082	1,106,389
	Wheat Flour (20-411-10)	1,729	92,474	456,417
	Semolina & Flour Mixture (20-411-15)	3	153	1,606
	Semolina (20-411-25)	3	135	879
	Wheat Middlings or Shorts (20-412-10)	1,205	50,959	231,373
	Wheat Bran & 2½% other ingredients (20-412-15)	4	115	1,130
	Wheat Bran (20-412-20)	553	15,748	77,618

Origins	Commodity	Cars	Tons	Revenue
	Compound, Flour, grain with other ingredients not exceeding 40% (20-452-30)	1	5	116
	Flour, edible NEC (20-452-90)	336	9,797	132,269
	TOTALS	5,258	278,468	2,007,797
New York Only Buffalo Niagara Falls Lockport	Wheat (01-137-10)	249	18,403	116,569
	Wheat Flour (20-411-10)	16,184	603,076	4,164,998
	Semolina & Flour Mixture (20-411-15)	6	206	1,913
	Semolina (20-411-25)	45	2,215	19,246
	Wheat Middlings or Shorts (20-412-10)	2,602	105,765	770,978
	Wheat Bran (20-412-20)	335	10,293	66,519
	Compound, Flour, grain with other ingredients not exceeding 40% (20-452-30)	3	62	764
	Flour, edible, NEC (20-452-90)	442	16,489	64,330
	TOTALS	19,866	756,509	5,205,317
	GRAND TOTALS	34,553	1,398,399	10,373,809

No. 35825

Appendix N

Tonnage of Wheat and Wheat Products Originated in 1972 at Principal Points in the States Named in the Verified Statement of T. E. Sellinger (Exhibit 11), Including Revenue Derived Therefrom (Penn Central)

Origin	Commodity	Cars	Tons	Revenue
Chicago	Wheat 01-137-10	43	2,615	29,261
	Wheat Flour 20-411-10	141	5,970	80,238
	Semolina & Flour Mixture 20-411-15	5	211	2,804
	Wheat Middlings or Shorts 20-412-10	180	7,402	62,815
	Wheat Bran 20-412-20	39	1,125	11,028
	Compound Flour grain with other ingredients not exceeding 40% 20-452-30	21	650	8,574
	Flour, edible, NEC 20-452-90	345	8,747	148,855
	TOTAL	774	26,720	343,575
Peoria, Ill.	Wheat Flour 20-411-10	5	153	2,245
	Semolina & Flour Mixture 20-411-15	1	20	600

Origins	Commodity	Cars	Tons	Revenue
	Flour, edible, NEC 20-452-90	5	134	755
	TOTAL	11	307	3,600
Springfield, Ill.	Wheat Flour 20-411-10	644	27,389	215,254
	Semolina & Flour Mixture 20-411-15	1	46	998
	Wheat Middlings or Shorts 20-412-10	22	779	6,386
	Wheat Bran & 2½% other ingredients 20-412-15	30	825	6,182
	Flour, edible, NEC 20-452-90	215	8,295	73,103
	TOTAL	911	37,334	301,923
Indianapolis	Wheat 01-137-10	9	743	10,251
	Wheat Flour 20-411-10	1,024	35,898	127,868
	Semolina & Flour Mixture 20-411-15	1	27	49
	Wheat Middlings or Shorts 20-412-10	79	3,301	17,173
	Flour, edible, NEC 20-452-90	3	82	166
	TOTAL	1,116	40,051	155,507

Origins	Commodity	Cars	Tons	Revenue
Chelsea, Mi.	Wheat Flour 20-411-10	125	3,959	45,921
	Wheat Middlings or Shorts 20-412-10	138	9,247	18,452
	Wheat Bran 20-412-20	4	146	1,382
	TOTAL	267	13,352	65,755
Detroit, Mi.	Wheat Flour 20-411-10	500	19,065	78,460
	Wheat Middlings or Shorts 20-412-10	375	15,910	66,276
	TOTAL	875	34,975	144,736
Hillsdale, Mi.	Wheat Flour 20-411-10	608	22,200	88,537
	Wheat Middlings or Shorts 20-412-10	347	14,393	58,249
	Wheat Bran 20-412-20	255	6,517	23,391
	Compound, Flour grain with other ingredients not exceeding 40% 20-452-30	676	20,480	158,149
	Flour, edible, NEC 20-452-90	13	448	1,938
	TOTAL	1,899	64,038	330,264

Origins	Commodity	Cars	Tons	Revenue
Buffalo, N.Y.	Wheat 01-137-10	116	10,214	82,408
	Wheat Flour 20-411-10	16,177	602,840	4,163,865
	Semolina & Flour Mixture 20-411-15	6	206	1,913
	Wheat Middlings or Shorts 20-412-10	2,602	105,765	770,978
	Semolina 20-411-25	45	2,215	19,246
	Wheat Bran 20-412-20	335	10,293	66,519
	Compound, Flour grain with other ingredients not exceeding 40% 20-452-30	2	47	466
	Flour, edible NEC 20-452-90	58	1,553	14,563
	TOTAL	19,341	733,133	5,119,958
Fostoria, Oh.	Wheat 01-137-10	43	4,041	24,179
	Wheat Flour 20-411-10	257	11,803	101,713
	Wheat Middlings or Shorts 20-412-10	49	1,893	13,145
	Wheat Bran 20-412-20	32	960	3,891

Origins	Commodity	Cars	Tons	Revenue
	Flour, edible, NEC 20-452-90	1	22	82
	TOTAL	382	18,719	143,010
Toledo, Oh.	Wheat 01-137-10	367	31,914	172,947
	Wheat Flour 20-411-10	893	49,833	192,774
	Semolina & Flour Mixture 20-411-15	1	15	108
	Wheat Middlings or Shorts 20-412-10	572	21,088	99,914
	Wheat Bran & 2½% other ingredients 20-412-15	4	115	1,130
	Wheat Bran 20-412-20	376	10,828	46,467
	Flour, edible, NEC 20-452-90	52	1,343	18,926
	TOTAL	2,265	115,136	532,266
St. Louis, Mo.	Wheat Flour 20-411-10	1,048	45,755	620,227
	Compound, Flour grain with other ingredients not exceeding 40% 20-452-30	1	14	460
	Flour, edible NEC 20-452-90	10	298	5,786
	TOTAL	1,059	46,067	626,473

No. 35825

Appendix O

Traffic Handled by N&W in 1972 From and To the Indicated Points, and Its Revenues Therefrom. (Export Traffic Excluded When Possible)

From	Commodity	Cars	Tons	Revenue
Chicago, Ill.	Wheat	164	7,264	$ 85,381
Peoria, Ill.	01137	0	0	0
Springfield, Ill.		0	0	0
Indianapolis, Ind.		0	0	0
St. Louis, Mo.		12	1,109	13,819
Buffalo, N.Y.		0	0	0
Fostoria, Ohio		57	4,931	33,658
Toledo, Ohio		276	16,846	136,861
		509	40,050	269,719
Chicago, Ill.	Flour	149	4,787	44,864
Peoria, Ill.	2041110	8	251	2,977
Springfield, Ill.	15	1,366	55,348	368,017
	20			
Indianapolis, Ind.		112	3,419	11,855
St. Louis, Mo.		340	11,520	103,089
Buffalo, N.Y.		149	4,349	13,676
Fostoria, Ohio		301	12,583	45,495
Toledo, Ohio		636	42,782	139,409
		3,061	135,039	729,382
Chicago, Ill.	Wheat Mids &	38	1,526	9,587
Peoria, Ill.	Shorts	0	0	0
Springfield, Ill.	2041210	382	14,369	34,987
Indianapolis, Ind.		11	464	2,159

From	Commodity	Cars	Tons	Revenue
St. Louis, Mo.		4	401	5,040
Buffalo, N.Y.		1	42	45
Fostoria, Ohio		103	4,075	14,264
Toledo, Ohio		1,157	46,754	175,747
		1,696	67,631	$241,829
Chicago, Ill.	Wheat-Bran	6	175	662
Peoria, Ill.	2041220	0	0	0
Springfield, Ill.		0	0	0
Indianapolis, Ind.		0	0	0
St. Louis, Mo.		0	0	0
Buffalo, N.Y.		0	0	0
Fostoria, Ohio		44	1,297	6,655
Toledo, Ohio		404	11,895	38,601
		454	13,367	45,918
Chicago, Ill.	Flour, Edible,			
Peoria, Ill.	NEC			
Springfield, Ill.	2045290	450	18,677	207,170
Indianapolis, Ind.		0	0	0
St. Louis, Mo.		1	25	319
Buffalo, N.Y.		0	0	0
Fostoria, Ohio		0	0	0
Toledo, Ohio		2	158	842
		541	21,347	$234,931
GRAND TOTALS		6,261	227,434	$1,521,779

APPENDIX E

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of February, 1976.

No. 35825

BOARD OF TRADE OF THE CITY OF CHICAGO

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Upon consideration of the record in the above entitled proceeding, and the petitions, filed February 5, 1976, by Western Lines and February 6, 1976, by Eastern Territory Railroads, seeking a finding that an issue of general transportation importance is involved:

It is ordered, That the petitions be, and they are hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX F

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1198

September Term, 1975

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

Petition for Review of Orders of the Interstate Commerce Commission.

Motions of Anheuser-Busch, Inc., The Board of Trade of Kansas City, Missouri, Inc., and American Bakers Association seeking leave to intervene in this cause have been considered by the court and are granted. Each of the parties named above is hereby admitted to this cause as an Intervenor-Petitioner.

April 29, 1976